No. 1617

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United States Court of Appeals

FOR THE SECOND CIRCUIT

No. 24,580

Marcel Boucher d.b.a. Boucher, and Marcel Boucher and Jeanne Boucher d.b.a. Marcel Boucher et Cie.

Plaintiffs-Appellees,

vs.

Duboyes, Inc., Arke, Inc., Capri Jewelry, Inc., Jules Steinberg, Morris Kimmelman, Hyman Slovitt, Abraham J. Slovitt and Samuel Friedman d.b.a. B. Steinberg-Kaslo Company (sued as Jules Steinberg and I. Slovitz d.b.a. B. Steinberg-Kaslo Company), Volupte, Inc., and Walter Heimler, Inc.

Defendants-Appellants.

Appeal from a final judgment of the United States District Court for the Southern District of New York.
(Civil Action No. 102-19)

BRIEF and APPENDIX for APPELLANTS

MAXWELL E. SPARROW
Attorney for Defendants-Appellants
665 ~~595~~ Fifth Avenue
New York 17, New York

TABLE OF CONTENTS

	Page
Statement of the Case	1
Subject Matter of This Action	1
The Basic Issues in This Case Are:	1
The Parties	3
The Copyrights in Suit	4
The Proceedings Below	7
The Errors Claimed	9
Argument	14
1 The District Court erred in holding that plaintiffs' articles of costume jewelry are properly the subject matter of copyright under the Copyright Law of the United States, that they are works of artistic craftsmanship and constitute copyrightable subject matter entitled to protection under the Copyright Law	14
Plaintiffs' Costume Jewelry Not Copyrightable Subject Matter	23
2 The District Court Erred in Holding That Plaintiffs Complied With the Statutory Requirements of Copy-Right Notice Under the Copyright Laws in the Sale and Marketing by Plaintiffs of Their Earrings No. 5917, Earrings No. 5918, Earrings No. 5984, Earrings No. 5983, Earrings No. 5920, and Earrings No. 5922 (plaintiffs' Physical Exhibits 17, 18, 28, 29, 36 and 37) and That the Copyrights Issued Therefor and For Pin No. 5947, Pin No. 5971 and Pin No. 5945 (Plaintiffs' Physical Exhibits 25, 26 and 27) Are Valid. The Copyright Notice Does Not Appear On All of the Copies	25
3 The District Court Erred in Holding That Defendants Infringed Plaintiffs' Copyright GP 7109G, Covering Necklaces Identified by Plaintiffs' Exhibits 52 and 53.	32
4 The District Court Erred in Holding That Defendants Infringed Plaintiffs' Copyright GP 7115G Covering Earring No. 5807 (Plaintiffs' Physical Exhibit 6) by Making and Selling Defendants' Earrings Identified By Plaintiffs' Physical Exhibits 50 and 51	33
5 Since Plaintiffs' Copyrights Were Issued For Only "Tailored" Articles of Costume Jewelry, They Cannot Claim Protection Under the Same Copyrights For Their "Semi-Tailored" Articles of Costume Jewelry Which are Adorned or Ornamented With Non-Precious Stones	34

Table of Contents

		Page
Argument [continued]		
6	The District Court Erred In Holding That With Respect to Copyrights GP 7115, Class G; GP 7123, Class G; GP 7106, Class G and GP 7109, Class G, The Articles of Costume Jewelry Published and Sold Thereunder Had the Proper Statutory Copyright Notice Affixed Thereto Required By the Copyright Law	37
7	The District Court Erred In Holding That The Basic Designs of Plaintiffs' Costume Jewelry Are Original	40
8.	The District Court Erred In Holding That the Individual Defendants Deliberately Copies Plaintiffs' Copyrighted Articles of Costume Jewelry, Used The Plaintiffs' Articles As Models From Which Rubber Molds Were Made, and That Identical Reproductions of Plaintiffs' Articles Were Then Produced in The Rubber Molds	41
9	The District Court Erred In Ordering and Decreeing A Permanent Injunction Against the Defendants Enjoining and Restraining The Latter From Publishing, Selling, Manufacturing and Marketing Their Articles of Costume Jewelry In Suit and In Holding That Plaintiffs Recover Defendants' Net Profits Derived From the Sale of All of the Articles of Costume Jewelry In Suit ...	42
Conclusion		43

TABLE OF CITATIONS

CASES

	Page
Adelman, Jack, Inc. v. Sonners, Inc. DCSNY 21 USPQ 218	20
American Tobacco Co. v. Werckmeister, 207 U.S. 284, 294	32
Baker v. Selden, 101 U.S. 99	20
Basavi v. Edward O'Toole Co., DCNY 1939, 26 F. Supp 41	27
Bouve v. Twentieth Century-Fox Film Corp., (APP DC) 122 F.2d 51	18
Dejonge v. Breuker, 235 U.S. 35	32
Deward & Rich, Inc. v. Bristol Savings and Loan Corp. (4 Cir. 1941), 120 F.2d 537 (50 USPQ 1)	27
Fleischer Studios v. Freudlich, 73 F.2d 276, 277; 23 USPQ 295, 296 (CCA)	27
Haas v. Leo Feist, 234 F. 105	40
Lithographic Co. v. Sarong, 111 U.S. 53	33
Metro Associated Services v. Webster City Graphic, Inc. D.C. Iowa, 117 F. Supp. 224; 100 USPQ 89, 94	27
Palmer v. Dewitt, 4 M. N.Y. 532, 536; 7 Am. Repp. 480	14
Stein v. Mazer, (CA 4), 204 F.2d 472; 97 USPQ 310, aff'd 347 U.S. 201; 100 USPQ 326	17
Universal Film Mfg. Co. v. Copperman, D.C. 212 F. 301	27

TEXTS

Andrews, Copyright Law and Practice, 1936	15
Copinger, Law of Copyright (3rd Ed., 1)	15
Howell "The Copyright Law", 1952	40

TABLE OF CONTENTS OF APPENDIX

	Page
Relevant Docket Entries	1a
Transcript of Testimony:	

Witness	Direct	Cross
[For Plaintiffs]		
Marcel Boucher	2a	14a
Jules Steinberg	33a	
Marcel Boucher (recalled)		52a
[For Defendants]		
Irving Kandell	53a	56a
[For Plaintiffs - rebuttal]		
Marcel Boucher (recalled)		60a

Complaint	64a
Answer and Counterclaim of defendants Capri Jewelry, Inc., et als	83a
Answer and Counterclaim of defendant Du Boyes, Inc.	120a
Answer and Counterclaim of defendant Arke, Inc.	137a
Reply to Du Boyes counterclaim	143a
Reply to Capri Jewelry, Inc., et als counterclaim	145a
Stipulation to Amend Answer	148a
Order Amending defendants' Answer	151a
Findings of Fact and Conclusions of Law	152a
Interlocutory Judgment	164a
Notice of Appeal	167a
Final Judgment	168a
Notice of Appeal	172a

INDEX OF EXHIBITS

Plaintiffs' Exh. No.	Description	Page
4	Certificate of Registration No. GP 7106G	173a
8	Certificate of Registration No. GP 7115G	175a
12	Certificate of Registration No. GP 7123G	177a
16	Certificate of Registration No. GP 7109G	179a
19	Certificate of Registration No. GP 7849G	181a
22	Certificate of Registration No. GP 7855G	183a
24	Certificate of Registration No. GP 7856G	185a
30	Certificate of Registration No. GP 7866G	187a
32	Certificate of Registration No. GP 7847G	189a
35	Certificate of Registration No. GP 7850G	191a
38	Certificate of Registration No. GP 7851G	193a
Defendants' Exh. No.		
I	Order No. 9518 of Marcel Boucher et Cie.	195a
J	5 invoices of Marboux Jewelry and 1 invoice of C. Ray Randall Mfg. Co.	197a
K	Business Certificate of Boucher	203a
P	Reproduction of necklace	205a
R	Card entitled "Changette"	206a
	Deposition of Marcel Boucher taken by defendants January 23, 1956	207a
	Deposition on Interrogatories of A. Kaminstein	210a

STATEMENT OF THE CASE

The Subject Matter of This Action

This is an action for copyright infringement and unfair competition. The complaint [D 64a et seq] alleges infringement by defendants of nineteen separate copyrights on articles of costume jewelry. This number was reduced to eleven by plaintiffs at the trial of the issues before Honorable Sylvester J. Ryan, District Court Judge. Plaintiffs' claim for unfair competition was dismissed. Defendant's counterclaim for a declaratory judgment declaring that the copyrights are ineffective, void and invalid and not infringed, that costume jewelry is not copyrightable subject matter as works of art under the Copyright Law and that plaintiffs are guilty of unfair competition, was also dismissed.

The Basic Issues in This Case Are:

1. Is costume jewelry copyrightable as works of art under the Copyright Law?

2. Did not the Register of Copyrights exceed the authority vested in him by the Copyright Law (17 U.S. Code) in accepting plaintiffs' articles of costume jewelry as copyrightable works of art and issuing Certificates of Registration thereon?

3. Did not the Register of Copyrights with the approval of the Librarian of Congress go beyond the authority vested in him under Section 207 of the Copyright Law, in vitally amending Section 201.4 (b)(7) of the regulations of the Copyright Office as it existed for a number of years prior to December 22, 1948, (which had omitted reference to jewelry) and which read:

> "Works of art and models or designs for works of art. This term includes all works belonging fairly to the so-called fine arts. (Paintings,

drawings, and sculpture.)

> "The protection of productions of the industrial arts utilitarian in purposes and character even if artistically made or ornamented depends upon action under the patent law; but registration in the Copyright Office has been made to protect artistic drawings notwithstanding they may afterwards be utilized for articles of manufacture.
>
> "Toys, games, dolls, advertising novelties, instruments, or tools of any kind, glassware, embroideries, garments, laces, woven fabrics, or similar articles, are examples. The exclusive right to make and sell such articles should not be sought by copyright registration."

to section 202.7 which reads

> "Works of art (Class G)-(a) In General. This class includes works of artistic craftsmanship, in so far as their form but not their mechanical or utilitarian aspects are concerned, such as artistic jewelry, enamels, glassware and tapestries, as well as all works belonging to the fine arts, such as paintings, drawings and sculpture. Works of art and models or designs for works of art are registered in Class G on Form G, except published three-dimensional works of art which require form GG."

without the approval of or an Act of the Congress of the United States.

4. Did not the plaintiffs fail to publish their works with copyright notice as required by Section 10 of the Copyright Law (17 U.S. Code) which states that "such notice shall be affixed to each copy" of the work "published or offered for sale in the United States", when they affixed copyright notice to only one earring of a pair of earrings loosely mounted on a card and when earrings are adapted for individual or separate uses as clips, buttons, or other adornments by women?

5. Did not the plaintiffs exceed the scope of their copyright protection by including under the same copyright (1) their uncopyrighted articles of costume jewelry made up of similar links of a copyrighted work, where the only copyright notice affixed to the latter

was on a large center motif not used in the former; (2) uncopyrighted semi-tailored articles of costume jewelry, that is, those embodying non-precious stones, when the copyrighted works are tailored, that is, those not embodying such stones.

6. Where an earring manufactured and sold by defendants bears a much closer resemblance in design to that of an uncopyrighted earring manufactured and sold by plaintiffs' affiliate than it bears to plaintiffs' copyrighted work, and where said uncopyrighted earring had no copyright notice affixed to it, do not those facts negative infringement by defendants of the copyrighted work?

7. Did not plaintiffs fail to comply with the form of copyright notice prescribed by Section 19 of the Copyright Law (17 U.S. Code), when, with respect to the first four copyrights mentioned below (date of first publication being June 14, 1954), the works were published with the legend "(c) Boucher", whereas, in fact, the certificate of conducting business under the name "Boucher" was not filed, as required by New York State Law, until August 10, 1954.

The Parties

Plaintiff-Appellees comprise Marcel Boucher, doing business as Boucher, the copyright claimant, and Marcel Boucher and Jeanne Boucher doing business as Marcel Boucher et Cie, the licensees, manufacturers and sellers of the copyrighted works which consist of articles of costume jewelry. They conduct their business at 304 East 23rd Street, New York, N. Y. Defendants-Appellants comprise Jules Steinberg, Morris Kimmelman, Hyman Slovitt, Abraham J. Slovitt and Samuel Friedman, co-partners conducting business as B. Steinberg-Kaslo Co., manufacturers of the articles of costume jewelry found by

the lower court to infringe the copyrights, and Du Boyes, Inc., Arke, Inc., Capri Jewelry, Inc., Volupte, Inc., and Walter Heimler, Inc., New York corporations, jobbers who purchased the articles of costume jewelry from B. Steinberg-Kaslo Co. and re-sold the same to their customers. All of the defendants-appellants have regular and established places of business in the City of New York, B. Steinberg-Kaslo Co. being located at 7 West 36th Street, in this city.

B. Steinberg-Kaslo Co. manufactures low cost articles of costume jewelry and caters to the low income class of people to give them the benefits of low cost jewelry. Marcel Boucher et Cie. manufactures and sells much higher-priced lines of costume jewelry, and, generally, does not sell to the same trade as the defendants-appellants sell B. Steinberg-Kaslo Co.'s articles of costume jewelry.

The Copyrights in Suit

On September 21, 1954, applications for copyright registrations were filed by Marcel Boucher d/b/a Boucher for articles of costume jewelry published June 14, 1954 by Marcel Boucher et Cie. Certificates of Registration of Claims to Copyright in Published three-Dimensional Works of Art were issued as follows:

Article of Costume Jewelry - Title		Certificate of Registration No.
Earring-Style No. 5807 [D 82a1]	Phy. Ex. 6	GP 7115 Class G [D 175a]
Pin-Style No. 5816 [D 82a2]	" 9	GP 7123 Class G [D 177a]
Pin-Style No. 5877 [D 82a4]	" 2	GP 7106 Class G [D 173a]
Necklace-Style No. 5831 [D 82a 3]	" 13	GP 7109 Class G [D 179a]

The applications for copyright registrations stated the name of the Copyright Claimant as "Marcel Boucher d/b/a Boucher",

the date of first publication as June 14, 1954, and the wording of the copyright notice appearing on the work as "(c) Boucher". However, Marcel Boucher did not file anywhere a Certificate of Conducting Business under the name "Boucher" until August 10, 1954.

On March 9, 1955 applications for copyright registrations were filed by Marcel Boucher d/b/a Boucher for articles of costume jewelry published January 2, 1955 by Marcel Boucher et Cie. Certificates of Registration of Claims to Copyright in Published Three-Dimensional Works of Art were issued as follows:

Article of Costume Jewelry - Title		Certificate of Registration No.
Earring-Style No. 5917 [D82a5]	Phy. Ex. 17	GP 7849 Class G [D 181a]
Pin-Style No. 5928 [D 82a6]	" 20	GP 7855 Class G [D 183a]
Pin-Style No. 5929 [D 82a7]	" 23	GP 7856 Class G [D 185a]
Pin-Style No. 5947 [D 82a8]	" 25	GP 7866 Class G [D 187a]
Necklace-Style No. 5913 [D82a9]	" 31	GP 7847 Class G [D 189a]
Pin-Style No. 5919 [D 82a10]	" 33	GP 7850 Class G [D 191a]
Earring-Style No. 5920 [D82a11]	" 36	GP 7851 Class G [D 193a]

All of the foregoing 11 copyright registrations were issued on what is generally known in the costume jewelry trade as "tailored" articles of costume jewelry, that is, on articles which are not ornamented with stones, as distinguished from what is generally known in the same trade as "semi-tailored" articles of costume jewelry which are ornamented with stones, usually rhinestones.

However, Marcel Boucher et Cie. manufactured and sold "semi-tailored" articles of costume jewelry marked with the copyright notice, claiming copyright protection which he obtained under the copyrights on the "tailored" articles of costume jewelry. Boucher gave

style numbers to the "semi-tailored" articles different from those identifying the "tailored" articles and sold them at a higher price. B. Steinberg-Kaslo Co. used the Boucher "semi-tailored" or rhinestone-studded pieces to make their "tailored" pieces and then made "semi-tailored" pieces from their (B. Steinberg-Kaslo Co.) own made "tailored" pieces.

Marcel Boucher et Cie. manufactured and sold the earrings in pairs, however, with but one exception (Physical Exhibit 6) had marked only one earring of each pair with the copyright notice. Earrings are used separately by women as clips or for other decorative purposes or as buttons for garments [Exhibit R, appendix and Physical Exhibits S, T, U].

Boucher copyrighted necklace Style No. 5831 [Exhibit 13] for which he received Certificate of Registration No. GP 7109 Class G. This necklace comprises a plurality of links to which is linked a front center motif in the shape of a bow. Only the bow bears the copyright notice. Marcel Boucher et Cie. manufactured and sold Styles Nos. 5837 and 5838 [Exhibits 14, 15] each made up of the links only (without the bow). Boucher did not copyright Style Nos. 5837 and 5838, but claims copyright protection thereon under the copyright obtained on the necklace having the bow [Style No. 5831, Exhibit 13], where the copyright notice only appeared on the bow.

A chart is given on page ii of the Brief setting out the articles of costume jewelry on which Boucher obtained copyrights, and the articles of costume jewelry on which copyright protection is claimed by Boucher under the same copyrights.

Both plaintiff, Marcel Boucher et Cie. and defendant, B. Steinberg-Kaslo Co. manufactured and sold the articles of costume

jewelry in gold-colored and silver-colored versions. A sample of defendants' earring in silver color was introduced in evidence [Defendants' Exhibit Q]. Around the time of the alleged infringement by defendants, plaintiff Marboux, Inc., an affiliate and closely related company of plaintiff, Marcel Boucher et Cie., at the instance of plaintiffs, [Defendants' Exhibit I] had manufactured and sold in quantities and without bearing any copyright notice, a pair of earrings [Defendants' Exhibit F] which as testified by Marcel Boucher is similar in basic design as Defendants' Exhibit Q and bears a resemblance to Plaintiffs' Exhibit 6.

The Proceedings Below

On the 7th of July 1955, plaintiff brought this action for copyright infringement arising under Title 17, United States Code, and for unfair competition, the jurisdiction being founded upon Title 28, United States Code, Section 1338, seeking a permanent injunction against the defendants from infringing the copyrights of the plaintiffs alleged in their complaint and from committing acts of unfair competition, and further seeking damages, profits, costs and attorneys' fees. Defendants served and filed Answers and Counterclaims and plaintiffs served and filed Replies to the Counterclaims. In their answers, defendants stated, among others, the following defenses, namely, that the Complaint fails to state a claim against the defendants upon which relief can be granted; that the works (articles of costume jewelry) are not proper subjects of copyright and are not works of artistic craftsmanship or works of art protectable under the Copyright Law; that the Librarian of Congress and the Register of Copyrights exceeded the authority vested in them by the Copyright Law (17 U.S. Code) in

accepting plaintiffs' articles of costume jewelry as copyrightable works of art; that the Register of Copyrights with the approval of the Librarian of Congress went beyond the authority vested in him under Section 207 of the Copyright Law, in amending Section 201.4 (b)(7) of the regulations of the Copyright Office as it existed prior to December 22, 1948 to Section 202.7, without the approval of or an Act of the Congress of the United States, said amendment not being within the discretionary powers of the Librarian of Congress and/or the Register of Copyrights; that plaintiffs failed to publish their works with copyright notice as required by Section 10 of Title 17, United States Code or to comply with the form of notice prescribed by Section 19 of said Title; that they failed to affix the notice of copyright to each copy or reproduction of the copyrighted works as required by Section 10 of said Title; and that with respect to the semi-tailored articles of costume jewelry, plaintiffs did not comply with the provisions of Section 13 of said Title and the Rules and Regulations of the Copyright Office, in that plaintiffs failed to file after publication of the works or articles of costume jewelry two copies of each thereof with the Register of Copyrights, and, therefore, have failed in their preservation and/or protection under the Copyright Law. Defendants in their counterclaim asked for a declaratory judgment declaring that the copyrights are ineffective, void and invalid and not infringed, that costume jewelry is not copyrightable subject matter under the Copyright Law, and that plaintiffs are guilty of unfair competition.

After a trial which was held in open court on the 26th, 27th and 28th days of November 1956, the Court made its written findings of fact and conclusions of law, that the aforementioned copyrights are valid and infringed, which were entered on the 7th day of January 1957. The same day an interlocutory judgment was entered in favor

of the plaintiffs on the copyright issue. Plaintiffs' claim for unfair competition was dismissed on the merits. Defendants' claim for a declaratory judgment was dismissed on the merits.

Defendants filed notice of appeal from the interlocutory judgment on the 30th day of January, 1957, and docketed the action and filed the record on appeal on the 25th day of March, 1957.

Thereafter, and pursuant to the terms of the interlocutory judgment, a Special Master was appointed by the Court to hear the proof of the parties in relation to damages and profits, and to report his findings thereon to the Court. On or about the 14th day of August, 1957, the Special Master filed his report which was confirmed by the Court.

Final judgment was entered on the 1st day of October in plaintiffs' favor for a total sum of $31,776.89, which included an allowance of $10,000.00 for attorney's fee.

Defendants filed notice of appeal from the final judgment on the 10th day of October, 1957, and docketed the action and filed a supplemental record on appeal on the 6th day of November, 1957.

The Errors Claimed

1. The District Court erred in holding that plaintiffs' articles of costume jewelry in suit are properly the subject matter of copyright under the Copyright Law of the United States.

2. The District Court erred in holding that plaintiffs' articles of costume jewelry in suit are works of artistic craftsmanship and constitute copyrightable subject matter entitled to protection under the Copyright Law of the United States.

3. The District Court erred in holding that the basic

designs of plaintiffs' costume jewelry are original.

4. The District Court erred in holding that plaintiffs' copyright GP 7115, Class G; GP 7123, Class G; GP 7106, Class G; GP 7109, Class G; GP 7849, Class G; GP 7855, Class G; GP 7856, Class G; GP 7866, Class G; GP 7847, Class G; GP 7850, Class G; and GP 7851, Class G are valid and that all of them have been infringed by defendants.

5. The District Court erred in holding that all of plaintiffs' articles of costume jewelry in suit were duly published by plaintiffs by the sale of copies thereof having the statutory copyright notice affixed thereto.

6. The District Court erred in holding that plaintiffs complied with the statutory requirements of notice under the Copyright Law in the sale and marketing by them of all of the articles of costume jewelry in suit.

7. The District Court erred in holding that plaintiffs complied with the statutory requirements of copyright notice under the Copyright Law in the sale and marketing by plaintiffs of their Earrings No. 5917, Earrings No. 5918, Earrings No. 5984, Earrings No. 5983, Earrings No. 5920, and Earrings No. 5922 [Plaintiffs' Physical Exhibits 17, 18, 28, 29, 36 and 37] and that the copyrights issued therefor and for Pin No. 5947, Pin No. 5971 and Pin No. 5945 [Plaintiffs' Physical Exhibits 25, 26 and 27] are valid. The copyright notice does not appear on all of these copies.

8. The District Court erred in holding that defendants infringed plaintiffs' copyright GP 7109, Class G, covering Necklace No. 5831 [Plaintiffs' Exhibit 13] by making and selling defendants' necklaces identified by Plaintiffs' Exhibits 52 and 53.

9. The District Court erred in holding that defendants infringed plaintiffs' copyright GP 7115, Class G covering Earring No. 5807 [Plaintiffs' Exhibit 6] by making and selling defendants' earrings identified by Plaintiffs' Physical Exhibits 50 and 51.

10. The District Court erred in holding

(a) that plaintiffs' Pin No. 5878 [Plaintiffs' Exhibit 3] is a repetition and representation of the design of Pin No. 5877 [Plaintiffs' Exhibit 2], and is covered by Copyright Registration GP 7106, Class G issued on Pin No. 5877.

(b) that plaintiffs' Earrings No. 5836 [Plaintiffs' Exhibit 7] is a repetition and representation of the design of Earrings No. 5807 [Plaintiffs' Exhibit 6] and is covered by Copyright Registration GP 7115, Class G, issued on Earrings No. 5807.

(c) that plaintiffs' Pin No. 5817 and Pin No. 5859 [Plaintiffs' Exhibits 10 and 11] are repetitions and representations of the design of Pin No. 5816, [Plaintiffs' Exhibit 19] and are covered by Copyright Registration GP 7123, Class G issued on Pin No. 5816.

(d) that Necklace No. 5837 and Necklace No. 5838 [Plaintiffs' Exhibits 14 and 15] are repetitions and representations of a copyrightable component part of the design of Necklace No. 5831 [Plaintiffs' Exhibit 13] and are covered by Copyright Registration GP 7109, Class G issued on Necklace No. 5831.

(e) that Earrings No. 5918 [Plaintiffs' Exhibit 18] is a repetition and representation of the design of Earrings No. 5917 [Plaintiffs' Exhibit 18] and is covered by Copyright Registration GP 7849, Class G issued on Earrings No. 5917.

(f) that Pin No. 5946 [Plaintiffs' Exhibit 21] is a repetition and representation of the design of Pin No. 5928 [Plaintiffs'

Exhibit 20] and is covered by Copyright Registration GP 7855, Class G issued on Pin No. 5926.

(g) that Pin No. 5971, Pin No. 5945, Earrings No. 5984, and Earrings No. 5983 [Plaintiffs' Exhibits 26, 27, 28 and 29] are repetitions and representations of the design of Pin No. 5947 [Plaintiffs' Exhibit 25] and are covered by Copyright Registration GP 7866, Class G, issued on Pin No. 5947.

(h) that Pin No. 5921 [Plaintiffs' Exhibit 34] is a repetition and representation of the design of Pin No. 5919 [Plaintiffs' Exhibit 33] and is covered by Copyright Registration GP 7850, Class G, issued on Pin No. 5919.

(i) that Earrings No. 5922 [Plaintiffs' Exhibit 37] is a repetition and representation of the design of Earrings No. 5920 [Plaintiffs' Exhibit 36] and is covered by Copyright Registration GP 7851, Class G issued on Earring No. 5920.

11. The District Court erred in holding that the individual defendants deliberately copied plaintiffs' copyrighted articles of costume jewelry, used the plaintiffs' articles as models from which rubber molds were made, and that identical reproductions of plaintiffs' articles were then produced in the rubber molds.

12. The District Court erred in holding that with respect to copyrights GP 7115, Class G; GP 7123, Class G; GP 7106, Class G and GP 7109, Class G, the articles of costume jewelry published and sold thereunder had the proper statutory copyright notice affixed thereto required by the Copyright Law.

13. The District Court erred in ordering and decreeing a permanent injunction against the defendants enjoining and restraining the latter from publishing, selling, manufacturing and marketing their

articles of costume jewelry in suit.

14. The District Court erred in holding that plaintiffs recover defendants' net profits derived from the sale of all of the articles of costume jewelry in suit, in allowing counsel fees to the extent directed, and in directing entry of a final judgment against all of the defendants for the amounts stated therein.

ARGUMENT

1. The District Court erred in holding that plaintiffs' articles of costume jewelry are properly the subject matter of copyright under the Copyright Law of the United States, that they are works of artistic craftsmanship and constitute copyrightable subject matter entitled to protection under the Copyright Law.

The District Court in holding as above stated, in effect ruled that the Register of Copyrights properly accepted plaintiffs' articles of costume jewelry for copyright as Works of Art.

It is respectfully submitted that the Librarian of Congress, and the Register of Copyrights exceeded the authority vested in them by Sec. 207, of Title 17, U.S.C. (Copyright Law) to make rules and regulations for the registration of claims to copyright, in accepting plaintiffs' articles of costume jewelry as copyrightable works of art and issuing the certificates of copyright registration.

The Constitution of the United States provides that Congress shall have power "to promote the progress of science and useful arts by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries." Article 1, Section 8, Clause 8. In pursuance of its constitutional powers, Congress passed the Copyright Act of 1909, U.S. Code, Title 17, which act secured to the person entitled thereto, upon complying with the provisions of the Act, the exclusive right to print, reprint, publish, copy and vend the copyrighted work. Sec. 1. The Act of July 30, 1947, C 391, 61 Stat. 652, codified and enacted into positive law Title 17 of the United States Code entitled "Copyrights".

The peculiar right conferred by statutory copyright is to multiply copies after publication to the exclusion of others, [Palmer v. DeWitt, 4 M. N.Y. 532, 536; 7 AM. REPP. 480;] and copyright may

be defined as the sole and exclusive liberty of multiplying copies of an original work which has been copyrighted. Copinger, Law of Copyright (3rd Ed., 1.) Andrews, Copyright Law and Practice, 1936. It is really the exclusive right conferred by statute, to further multiply copies of a work after it has been first published. It is the original which has to be first copyrighted before the copyright owner may claim the exclusive right to publish reproductions of copies thereof. Included under the Copyright Law as copyrightable subject matter is, works of art; models or designs for works of art, Sec. 5(a). Section 5 specifically classifies copyrightable works in the following manner;

(a) Books, including composite and cyclopedic works, directories, gazetters, and other compilations,

(b) Periodicals, including newspapers.

(c) Lectures, sermons, addresses (prepared for oral delivery).

(d) Dramatic or dramatico-musical compositions.

(e) Musical compositions.

(f) Maps.

(g) Works of art; models or designs for works of art.

(h) Reproductions of a work of art.

(i) Drawings or plastic works of a scientific or technical character.

(j) Photographs.

(k) Prints and pictorial illustrations including prints or labels used for articles of merchandise.

(l) Motion-picture photoplays.

(m) Motion pictures other than photoplays.

The Copyright Act of 1909 and Title 17, U.S.C., Section 207, provide that "subject to the approval of the Librarian of Congress, the Register of Copyrights shall be authorized to make rules and

regulations for the registration of claims to copyright.

Pursuant to the authority vested in the Register of Copyrights by the Copyright Act of 1909, to make rules and regulations for the registration of claims to copyright, the Register promulgated the following rules with respect to works of art, which rules were in effect at least since 1926, Sec. 201.4(b)(7), to 1950, and reads as follows:

> "Works of art and models or designs for works of art. This term includes all works belonging fairly to the so-called fine arts. (Paintings, drawings, and sculpture.)
>
> "The protection of productions of the industrial arts utilitarian in purpose and character even if artistically made or ornamented depends upon action under the patent law; but registration in the Copyright Office has been made to protect artistic drawings notwithstanding they may afterwards be utilized for articles of manufacture.
>
> "Toys, games, dolls, advertising novelties, instruments, or tools of any kind, glassware, embroideries, garments, laces, woven fabrics, or similar articles, are examples. The exclusive right to make and sell such articles should not be sought by copyright registration."

The Act of July 30, 1947, which enacted into positive law Title 17, of U.S.C., did not enlarge upon the authority of the Librarian of Congress or Register of Copyrights with respect to their rule-making concerning works of art. It copied the exact wording which existed under the 1909 Copyright Act (derived from Sec. 53 of Title 17, U.S.C. 1946, Act of March 4, 1909, C. 320 Sec. 53, 35 Stat. 1085). As a matter of fact, the above rule with respect to works of art existed up to about December 22, 1948 after the Copyright Law of 1947 was enacted, so that no authority was derived from the new Copyright Law to empower the Copyright Office to make a radical

change which would require an amendment by Act of Congress, and not by the Copyright Office.

The Copyright Office rules were changed, on or about December 22, 1948, to become effective in 1950, new section becoming Sec. 202.7 and reading as follows:

> "Works of art (Class G)-(a) In General. This class includes works of artistic craftmanship, in so far as their form but not their mechanical or utiliarian aspects are concerned, such as artistic jewelry, enamels, glassware, and tapestries, as well as all works belonging to the fine arts, such as paintings, drawings and sculpture. Works of art and models or designs for works of art are registered in Class G on Form G, except published three-dimensional works of art which require Form GG."

Under the prior regulations, Sec. 201.4 (6) (7), it was the policy of the Copyright Office to refuse to accept jewelry, such as costume jewelry, for copyright registration, the nature of such jewelry being considered utilitarian in purpose. In Stein v. Mazer [CA4] 204 F.2d 472; 97 U.S.P.Q. 310, aff'd 347 U.S. 201; 100 U.S.P.Q. 326; the court, on page 313, said:

> "On the other hand, it has been the practice of the Copyright Office since 1909 to refuse copyright registration only to those works of a wholly utilitarian nature which could not be called works of art although they might possess pleasing design."

Mr. Sam B. Warner, who was Register of Copyrights when the rule affecting works of art was changed to Sec. 202.7, in an article written by him in the "Jewelers Circular-Keystone" a publication, September 1948 issue, re-printed in the Journal of the Patent Office Society, July 1949, states, on page 488 of the re-print:

> "--previous Registers of Copyright have not been willing to accept artistic jewelry for copyright registration--."

It is seen that artistic jewelry was an item not considered to be

entitled to copyright protection by the former Registers of Copyright. Mr. Sam B. Warner, Register of Copyrights in 1948 had some doubt as to whether artistic jewelry was copyrightable, when he said, in the above stated article p. 488, that

> "--- It is, of course, entirely possible that I may be wrong in thinking that artistic jewelry is copyrightable. ---"

Where it has been the practice of the Copyright Office to deny copyright protection to artistic jewelry over a period of time, such practice should be given great weight when a court is called upon to determine the copyrightability of such subject matter. As was set forth by Judge Dobie in the opinion of the Court of Appeals in the Mazer v. Stein case, supra, with respect to the practice of the Copyright Office;

> "When an agency of the United States is empowered by a federal statute to issue regulations under, and also to administer and apply, that statute, and when the agency over a course of years applies that statute in a certain way, that application should be given great weight when a court is called upon to determine the meaning of the statute. ---"

In view of the long established practice of the Copyright Office, from 1909 to 1948, in refusing copyright protection to costume jewelry, and because great weight should be given to such former practices, the change in the regulations promulgated by the Register of Copyrights to permit copyright protection to costume jewelry, constitutes an abuse of discretion by the Register of Copyrights, who went beyond his statutory powers in the making and also in the administration of such rules and regulations. Bouve v Twentieth Century-Fox Film Corp. (APP DC) 122 F.2d 51.

It is very significant that, from the year 1909 to the year 1948, although the work "fine" had been eliminated from the Copyright

Law, the Copyright Office refused to accept alleged works of art such as jewelry, for copyright purposes. In other words, for a span of 39 years the various administrative officers of the Copyright Office refused to recognize costume jewelry as copyrightable subject matter, then suddenly in 1948 the Copyright Office, without any Congressional authority, decided to include costume jewelry as a work of art. There is no guarantee that the next administrative officer of the Copyright Office would not decide to eliminate artistic or costume jewelry as a work of art.

That such a condition is possible is apparent from a statement under oath made by Mr. Abraham L. Kamenstein, Chief of the Examining Division of the Copyright Office in proceedings had on May 14, 1956 in connection with the propounding of Interrogatories and Cross Interrogatories to him, in the present litigation.

> "Q6. Has the Register of Copyrights, subject to the approval of the Librarian of Congress, the power to amend the regulations so as to change them back to what they were prior to 1948 to exclude artistic jewelry as copyrightable material?
>
> A6. Under Section 207 of Title 17, U.S.C. the Register of Copyrights, subject to the approval of the Librarian of Congress, may amend the regulations though he obviously would not do so to exclude the registration of copyrightable material." [D 218a]

By altering such rules, the Register of Copyrights did not regulate but legislated and usurped the power of the Congress to amend the Copyright Law to include jewelry, since it was Congress who enacted Sec. 5 as part of the Copyright Law. The dichtomy of protection for the aesthetic is not beauty and utility, but art for the copyright and the invention of original and ornamental design for design patents. If the Register of Copyrights has the authority to make

changes in the regulations to include costume jewelry as copyrightable subject matter, then a later Register of Copyrights may regulate to again exclude costume jewelry as copyrightable subject matter, thus throwing the industry into confusion. Congress never intended to give the Register of Copyrights any such authority without an express provision in the statutes applicable thereto.

Why should a piece of costume jewelry, which is in a sense wearing apparel, be given copyright protection and an article of wearing apparel such as a dress, which embodies artistic design, be denied copyright protection? In Jack Adelman, Inc., v Sonners, Inc. DCSNY 21 U.S.P.Q. 218, the court stated, that an artistic drawing from which a dress is made is copyrightable but that the dress itself is not. The latter can only be secured, if it can be secured at all, by letters patent. The court quoted Baker v Selden, 101 U.S. 99:

> "To give the author of the book, an exclusive property in the art described herein when no examination of it's novelty has ever been officially made, would be a surprise and a fraud upon the public."

It is well known that the Copyright Office makes no examination as to novelty of costume jewelry or other work presented for copyright registration. If the application complies with required formalities, it issues copyright registration.

As heretofore pointed out, Article 1, Sec. 8, Clause 8 of The Constitution of The United States, provides, "that Congress shall have power to promote the progress of science and the useful arts by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries." [Underscoring supplied.] It is not contended that the copyright clause of the Constitution was intended to protect only literal "writings", meaning such objects as

books and periodicals - words written in the form intelligible to all who can read, but it is contended that from the first enactment in 1790 to the most recent codification in 1947, it was the Congress which determined the scope of copyright. What has been construed as copyright within the definition of "writings" was decided by Congress and not by any arbitrary rule or regulation of the Copyright Office.

The Act of 1790, specified maps, charts, and books as objects of protection.

The Act of 1802, extended copyright protection to those "who shall invent and design, engrave, etch or work --- any historical or other print or prints."

The Act of 1831, which was the first general revision of the Copyright Law, specifically enumerated the subject of copyright, adding musical compositions and cuts to the list.

The Act of 1856, added to the list dramatic compositions.

The Act of 1865, expressly added photographs and negatives to the list of protected works, defines "book" for the first time as including maps, prints, or other engravings contained within the book.

The Act of 1870, added to the enumerated list such works as paintings, drawings, chromes, statuettes, stationery, and models or designs intended as works of fine art.

The Act of 1909, revised, collated, and reorganized the federal copyright laws and this Act became, and still is the basic copyright law.

The elimination of the word "fine" from the 1909 and 1947 Acts does not authorize the Copyright Office to include therein articles of costume jewelry, which comes within the province of design patents. Such inclusion in the copyright law should be only by Act of the Con-

gress in accordance with its past performances. The Librarian of Congress at a Congressional hearing, prior to the enactment of the 1909 Act, testified:

> "---The term 'works of art' is deliberately intended as a broader specification than 'works of the fine arts' in the present statute with the idea that there is subject matter (for instance, of applied design, not yet within the province of design patents), which may properly be entitled to protection under the copyright law." (Hearings Committee on Patents, House of Representatives and Senate Committee on Patents, H.R. 19853, 59th Cong., 1st Sess., June 6-9, 1906, p. 11.)"

Note that he said "applied design, not yet within the province of design patents". Most certainly, costume jewelry is within the province of design patents.

Even the then Librarian of Congress certainly did not have in mind the inclusion of costume jewelry from 1909 to 1948, for he and his successors specifically excluded such items as copyrightable matter. If the Congress in enacting the 1909 and 1947 Acts had in mind including craftsmanship as copyrightable subject matter it would have specifically provided therefor by adding another and specific subsection to Section 5. It may be stated in passing that the Mazer v. Stein case, supra, involved a statuette which had been specifically mentioned in one of the prior Copyright Acts as being copyrightable. There is no doubt that a statuette falls within the realm of a work of art as defined by the statute, but nevertheless it was Congress which specifically provided that it be the proper subject for copyright. On the other hand, costume jewelry being an article of craftsmanship, Congress most certainly would have provided for its copyrightability as in the case of the statuette. Certainly there is no greater degree of art apparent in costume jewelry than in a dress design, yet no copyright protection is applicable to such dress designs or creations,

and a dress design comes within the province of applied design.

Therefore, it is again submitted, that the Register of Copyrights went well beyond the authority vested in him in amending the long previously established rules or regulations to include articles of costume jewelry as being copyrightable matter. By permitting a Register of Copyrights to arbitrarily make rules or regulations to include or exclude the registration of copyrightable material, goes far beyond the power vested in him by the Congress. That the Copyright Office has the power to do so was expressly admitted by the Copyright Office [D 218a].

Plaintiffs' Costume Jewelry Not Copyrightable Subject Matter

In Mazer v. Stein, supra, plaintiffs manufactured and sold electric lamps. One of the plaintiffs created original works of sculpture in the form of human figures by clay model technique. From this model, a production mold for casting copies was made. The resulting statuette, without any lamp components added, was submitted by the plaintiffs to the Copyright Office for registration as "works of art" under Section 5 of the Copyright Law, and certificates of registration issued. After copyrighting the statuettes, the plaintiff used them to make fully equipped lamps. Thereafter, the statuettes were sold in quantity throughout the country, both as lamp bases and statuettes. It is particularly to be noted that in this case copyrights were first and initially received on the statuettes as works of art and the required copies of the stauettes deposited in the Copyright Office to secure copyright registration on the statuettes. Later, the statuettes were put to a utilitarian purpose as lamp bases and the Court ruled that the fact that the statuettes were first copyrighted as works of

art, and then put to utilitarian use in the form of lamp bases, did not effect copyrightability in the statuettes. The copyrights being valid, the manufacture by others of lamps which included the statuettes, would be infringements of the copyrights obtained initially on the statuettes.

In the case at bar, plaintiffs did not copyright the drawings, designs, or the original pieces which went into the fabrication of the articles of costume jewelry, as works of art. They did not, after the making of a model, make castings of the entire article of costume jewelry from a production mold, but in order to make up the completed article which they presented to the Copyright Office for Copyright and which they sold, plaintiffs had to add utilitarian parts, such as stones and clasps or hinges or chains connecting the parts together. Plaintiffs did not copyright the finished castings coming out of the molds, but accompanied the applications for registration with the fabricated assembly, completed and assembled from the parts taken out of the molds together with other mechanical parts. If, in the Mazer v. Stein, supra, case the lamp was disassembled, the statuette would still remain intact and would still have artistic appeal, whereas, in the articles of costume jewelry, if the parts were disassembled they would comprise nothing more than a conglomerate mass. For example, an article of costume jewelry, such as a necklace, is made up of several parts, each of which may be a separate casting, and the parts are connected together by mechanical means such as links, hinges, etc., and stones may be added, a pin attached to complete the article for sale. It is this purely utilitarian article made up of pieces having in themselves no artistic value which plaintiffs sought to copyright, and upon which the Copyright Office erroneously issued a certificate of registration of a claim to copyright.

Plaintiffs for a government fee of $4.00 and without the Copyright Office being required to make any search to determine if the work is original, obtained a monopoly for 28 years, whereas, protection can be obtained for the same work by a design patent for a maximum period of 14 years only after the Patent Office has made a thorough search as to novelty and invention and a total government fee of $30.00 is paid.

Surely the Congress did not intend any such copyright monopoly to be extended to commercial costume jewelry by dignifying it as a work of art.

Annexed to this Brief [p. i] is an article which was published in the November 15, 1957, issue (page 14) of WOMAN'S WEAR DAILY, a trade newspaper published by Fairchild Publications, Inc., in New York, N. Y. and written by Bernard Groger, a member of the staff of said newspaper, reflecting views of the industry regarding the loose practice of copyrighting costume jewelry and leaving the door "wide open for practically any style to be approved and sanctioned" by the Copyright Office "as original".

2. The District Court Erred in Holding That Plaintiffs Complied With The Statutory Requirements of Copyright Notice Under The Copyright Laws in The Sale and Marketing by Plaintiffs of Their Earrings No. 5917, Earrings No. 5918, Earrings No. 5984, Earrings No. 5983, Earrings No. 5920, and Earrings No. 5922 (Plaintiffs' Physical Exhibits 17, 18, 28, 29, 36 and 37) and That The Copyrights Issued Therefor and For Pin No. 5947, Pin No. 5971 and Pin No. 5945 (Plaintiffs' Physical Exhibits 25, 26 and 27) Are Valid. The Copyright Notice Does Not Appear On All of The Copies.

Section 10 of the Copyright Law states:

> "Publication of work with notice.
>
> "Any person entitled thereto by this title may secure copyright for his work by publication thereof with the notice of copyright

> required by this title; and such notice shall be affixed to each copy thereof published or offered for sale in the United States by authority of the copyright proprietor, except in the case of books seeking ad interim protection under section 22 of this title. July 30, 1947. c. 391, sec. 1, 61 Stat. 652." [Underscoring supplied]

Annexed hereto is a chart [p. ii] in which there is listed the actual "tailored" articles of costume jewelry copyrighted, their exhibit numbers, style numbers, types, corresponding certificates of copyright registration, their exhibit numbers and dates of publication; and the "semi-tailored" articles claimed by the plaintiff to be protected under the aforegoing copyright registration, their respective exhibit numbers, style numbers and types.

Physical Exhibits 17, 18, 28, 29, 36 and 37 each comprises a pair of earrings only one of which is marked with a copyright notice. Physical Exhibits 25, 26 and 27 are pins corresponding to earrings (physical Exhibits 28, 29) and claimed under copyright GP 7866G. Copyrights GP 7849G, GP 7851G and GP 7866G for these items are invalid because the copyright notice appears on only one earring of each pair of earrings. It has been proved conclusively at the trial that earrings are used separately as ornamental clips for ladies wearing apparel or other ornamentation and for utilitarian purposes, as for example when the clip portion is passed through two registering buttonholes and made to clip the corresponding parts of the garment together.

Mr. Kandell, one of defendants' witnesses who has been in the costume jewelry business for over 38 years and manufactures and jobs costume jewelry for the garment trade, testified that he purchased earrings from the defendant B. Steinberg-Kaslo Co., mounted them on cards and sold them in large quantities for use as earrings or separately as dress ornaments and accessories [D 53a et seq.].

There were received in evidence defendants' Physical Exhibits S, T and U relating to earrings and marketable as "changettes", and an accompanying folder (Exhibit R) [D 206a], describing these "changettes" and stating that they "can be used as clips, or for other decorative purposes", and "can be used as earrings".

Section 10 of the Copyright Law is specific in requiring that each copy of a copyrighted work bear the statutory notice of copyright. Publication with notice of copyright is of the essence in complying with the statute, and publication without such notice amounts to a dedication to the public. (Universal Film Mfg. Co. v. Copperman; D.C. 212 F. 301; Fleischer Studios v. Freudlich, 73 F.2d 276, 277; 23 USPQ 295, 296; (CCA); Basavi v. Edward O'Toole Co., D.C.N.Y. 1939, 26 F. Supp. 41.

In Metro Associated Services v. Webster City Graphic, Inc. D.C. IOWA, 117 F. Supp. 224; 100 USPQ 89, at page 94, the Court stated: "Every reproduction of a copyrighted item must under Sec. 10, 17 U.S.C.A., bear the statutory notice. Deward & Rich, Inc. v. Bristol Savings and Loan Corp. (4 CIR. 1941), 120 F.2d 537 (50 USPQ 1)."

The fact that individual earrings can be used as dress clips was admitted by plaintiff, Boucher:

> THE COURT: Am I correct, Mr. Boucher, in saying that in some pairs of earrings there is a right earring and a left earring?
>
> THE WITNESS: That's right.
>
> THE COURT: And in other pairs of earrings they are interchangeable?
>
> THE WITNESS: When it comes to the left and the right, they cannot sell one earring. That is impossible.
>
> THE COURT: I don't know about that. Mr. Boucher, these earrings might also be used as small dress clips, is that right?

THE WITNESS: Well, they could.

THE COURT: For instance, give me one of those earrings, that last one that I spoke about.

THE WITNESS: We had quite a bit of --

THE COURT: For instance, take this Exhibit 24. This might be used as an earring. This would be left earring, would it not?

THE WITNESS: That's right.

THE COURT: And it might also be used as a dress clip, is that right?

THE WITNESS: Yes.

THE COURT: One of the ladies might put one on the right side of the neck --

THE WITNESS: That's right.

THE COURT: -- and the other on the left side of the neck.

THE WITNESS: It is only small clips like that would be used mostly by pair.

THE COURT: But these can be used separately as dress clips, separate dress clips or handkerchief clasps to clip a lace or fancy handkerchief to the costume.

THE WITNESS: May I explain something on that? When you have a small piece like that, where we have to put both the style number and the copyright notice, in many instances you hardly have any surface. It happened on this particular area you may have enough surface to put both of them.

THE COURT: The law requires that the notice be put on the article. All right.

THE WITNESS: You know, the customer objects that there are too many names on the back of the pieces.

THE COURT: I know your problem, but I did not make the law. [D 6a, 7a]

The physical exhibits and testimony show, and indeed plaintiffs will not deny, that only substantially one-half of the quantity of earrings sold by plaintiffs have affixed thereto the statutory copyright

notice.

It may be mentioned here that the Court initially was of the opinion that plaintiffs lost their above mentioned copyrights:

> THE COURT: For instance, take this Exhibit 37, which is a pair of earrings.
>
> THE WITNESS: That's right.
>
> THE COURT: These are not symmetrical earrings. One is a right earring, and the other is a left earring.
>
> THE WITNESS: That's right. In that case we do put copyright notices on one earring.
>
> THE COURT: Only on one?
>
> THE WITNESS: Yes, and the style number on the other.
>
> THE COURT: Then I think you lost your copyright, if that is your pattern. I am talking to your lawyer. I think you have lost your copyright on that by having a publication without notice.
>
> MR. KNAPP: Well, our position is --
>
> THE COURT: All right. That is just my feeling. Where you have marketed a product without notice, as you have here, marking only one of two separate and distinct earrings, both, of course, constituting a pair, one designed for the right and the other for the left and in reverse pattern, and where you only marked one earring, you have a marketing then of the other earring without notice of copyright, and I think you forfeited your right.
>
> MR. KNAPP: Our position is that we never sell one earring. We sell two earrings, and a notice on one is simply a notice on the design.
>
> THE COURT: No. I think you will find cases to the contrary. For instance, you will find a number of cases involving book ends. Of course, to have bookends you have to have a pair, and in every case I ever came across both bookends had to be marked with the copyright notice.
>
> * * *
>
> THE COURT: I will simply point this out to you as an observation which I make which you can turn over in your mind, and, if you have anything that you want to refer to me -- I don't want a long memorandum -- like one case

MR. KNAPP: We have to keep in mind that this field of copyrights on jewelry is a relatively new one, and I will keep that point in mind.

THE COURT: It is relatively new, but each earring constitutes a separate marketing, and each product must be marked with a notice of copyright, and I think that, where you have marketed a pair of earrings, you are required by the law to mark with a copyright notice both of the pair. [D 4a-6a]

It is quite evident, as pointed out by the lower court, that there are two physical separate articles, each embodying the one basic design.

Boucher admitted that it was possible for him to put the copyright notice on both earrings of each pair of earrings.

THE COURT: In this number, this pair of earrings, Defendants' Exhibit A, you have marked a notice of copyright in one and only one of the two earrings.

THE WITNESS: That's right.

THE COURT: Do you say that it would have been impossible to have put the copyright notice in the other earring in the casting where you placed the style number.

THE WITNESS: It is not impossible to put it in there, but after a very short while the copyright notice could have been -- would be very blurred. You see what I mean? You could not see it.

THE COURT: Would it have been any more blurred than the style number is?

THE WITNESS: But the same thing would happen for the style number.

THE COURT: Was it impossible for you to use a die and a hammer to put on a copyright notice on both of these earrings of Exhibit -- Defendants' Exhibit A?

THE WITNESS: Well, it would have been possible, but bear in mind also the fact that you have a very, very sharp curve, you see.

THE COURT: Did you ever use in any of these numbers in suit a metal die and hammer for the purpose of affixing either your name or any other notice on the article that was produced?

THE WITNESS: We do it sometimes on necklaces, where the pieces are the same, you know.

THE COURT: All right. [D18a, 19a]

A copyright notice which is legally ineffective is not rendered legally effective as to a particular alleged infringer by the fact that the circumstances were such as to afford "such alleged infringer actual knowledge of the copyright or by the fact that the circumstances were such as to direct his attention to sources from which information as to copyrights might be obtained. Metro Associated Services v. Webster City Graphic, Inc., supra. The mere fact that only one copyright notice appears on each pair of earrings is not sufficient to put the defendants on notice that a valid copyright has issued. As the Supreme Court said in Miffin v. R. H. White Co., 190 U.S. 260,

> "It is incorrect to say that any form of notice is good which calls attention to the person of whom inquiry can be made and information obtained since the right being purely statutory, the public may justly demand that the person claiming a monopoly shall pursue, in substance at least, the statutory method of securing it."

The proper statutory marking is of the essence of the preservation of copyright monopoly, Basevi v. Edward O'Toole Co. D.C.N.Y. 1939, 26 F. Supp. 41, and failure to comply is a fatal defect which canot be remedied.

For the foregoing reasons, plaintiffs' copyrights GP 7849G, GP 7851G and GP 7866G are ineffective and invalid for failure to mark each copy or reproduction with copyright notice as required by Section 10 of the Copyright Law and that, consequently, defendants have not infringed the said copyrights purportedly issued to cover plaintiffs' costume jewelry articles Earrings-Style Nos. 5917; 5918; 5983; 5984; 5920; 5922 and corresponding Pins-Style Nos. 5947; 5971;

5945.

3. The District Court Erred in Holding That Defendants Infringed Plaintiffs' Copyright GP 7109G, Covering Necklaces Identified by Plaintiffs' Exhibits 52 and 53.

Defendants did not copy plaintiffs' Physical Exhibit 13, and, therefore, did not infringe copyright GP 7109G. Copyright GP 7109G does not cover plaintiffs' Exhibits 14 and 15, and, therefore, defendants' copying and selling the same do not constitute infringement.

With respect to physical Exhibit 13, it is to be particularly noted that the copyright notice appears on the ornamental bow or motif at the front of the necklace and that no copyright notice appears on any of the links. The necklace is articulated, that is, the ornamental piece upon which the copyright notice appears is hingedly connected to adjoining links of the remaining portions of the necklaces. Plaintiffs have obtained copyright registration GP 7109G on this item. Plaintiffs contend that Physical Exhibits 14 and 15 are covered by copyright registration GP 7109G issued on Exhibit 13. This contention is manifestly erroneous since the element of Exhibit 13 on which the copyright notice is stamped does not appear as part of Exhibits 14 and 15, and no corresponding part of Exhibits 14 and 15 in Exhibits 13 is marked with the copyright notice. Furthermore, since the links are repeats, it is essential that each link bear the copyright notice. It is well established that where an ornamentation consists of repetitions of a unit design, each repeated design should bear an individual notice of copyright. Dejonge v. Breuker, 235 U.S. 35. This case cited American Tobacco Co. v. Werckmeister, 207 U.S. 284, 294, for the proposition that every reproduction of a copy-

righted work must bear the statutory notice.

In American Tobacco Co. v. Werckmeister, supra, the Court quoted the language of the learned judge in Lithographic Co. v. Sarong, 111 U.S. 53, as follows:

> "With respect to this latter question, it is enough to say that the object of the statute is to give notice of the copyright to the public, by placing upon each copy, in some visible shape, the name of the author, the existence of the claim of exclusive right * * *" (Underscored part is in italics in the opinion.).

Plaintiffs never had any intention of obtaining copyright registration on Exhibits 14 and 15.

4. The District Court Erred in Holding that Defendants Infringed Plaintiffs' Copyright GP 7115G Covering Earring No. 5807 (Plaintiffs' Physical Exhibit 6) by Making and Selling Defendants' Earrings Identified by Plaintiffs' Physical Exhibits 50 and 51.

Defendants' earrings (plaintiffs' Physical Exhibits 50 and 51) bear a much closer resemblance in design to that of the design of an uncopyrighted earring manufactured and sold by plaintiffs' affiliate, Marboux, Inc. (Defendants' Physical Exhibit F) than it bears to plaintiffs' copyrighted work (plaintiffs' Physical Exhibit 6). This Marboux uncopyrighted earring had no copyright notice affixed to it. Therefore, defendants have not infringed plaintiffs' copyright GP 7115G covering plaintiffs' Exhibit 6.

As heretofore stated, the Marboux earrings (defendants' Exhibit "F") bore no copyright notice. Marboux is an affiliate of plaintiffs [D 22a-28a].

The lower Court in comparing the Marboux earrings with plaintiffs' Exhibit 6 stated that it appeared to it that defendants Exhibit F, the Marboux earrings, is of a different design from the plaintiffs'

earrings, Exhibit 6, and that it finds no similarity in design or art representation. Plaintiffs' witness, Mr. Boucher, on cross-examination was shown one of defendants' earrings [Exhibit 50] which plaintiffs claim infringed the copyright on their Exhibit 6, and was asked to compare the defendants' earrings with the Marboux earrings, Exhibit F, and he stated that they are similar in basic design. Therefore, defendants' earrings could not have been an infringement of plaintiffs' copyright registration GP 7115G obtained on plaintiffs' Exhibit 6, since the lower court had already expressed its opinion that there was no similarity in design or art representation between the Marboux earrings manufactured through the plaintiffs and plaintiffs' Exhibit 6. [D 27a-29a]

In view of the foregoing, defendants have not infringed plaintiffs' copyright GP 7115G.

5. Since Plaintiffs' Copyrights Were Issued For Only "Tailored" Articles of Costume Jewelry, They Cannot Claim Protection Under the Same Copyrights For Their "Semi-Tailored" Articles of Costume Jewelry Which Are Adorned Or Ornamented With Non-Precious Stones.

Plaintiffs did not obtain copyright registrations on the "semi-tailored" articles of costume jewelry. The Certificates of Registration for Copyright [Plaintiffs' Exhibits 4, 8, 12, 16, 19, 22, 24, 30, 32, 35 and 38] referred to in the chart annexed to this Brief cover only "tailored" articles of costume jewelry [Plaintiffs' trial Physical Exhibits 2, 6, 9, 13, 17, 20, 23, 25, 31, 33, 36) referred to in the same chart.

Defendant Steinberg called as a witness by Plaintiffs testified that defendant B. Steinberg-Kaslo Co. did not use the "tailored" articles (except Exhibit 23) to make their versions of their articles,

but used rhinestone-studded pieces [D 33a, 35a, 37a, 38a, 44a, 47a, 48a, 50a-51a].

Plaintiffs cannot claim copyright protection on the rhinestone-studded (semi-tailored) articles of costume jewelry under the copyright registrations issued by the Copyright Office for the "tailored" articles, since the provisions and arrangement of the stones on the items constitute a "new work" within the terms of the Copyright Law. Therefore, since the rhinestone-studded pieces are revised or new works, additional copyright registrations should have been obtained therefor, and the plaintiffs not having obtained the same, cannot maintain this action for copyright infringement for a copying of the said articles. [17 U.S.C.A. 23]. This section of the Copyright Law, among other things, states that

> "No action or proceeding shall be maintained for infringement of copyright in any work until the provisions of this title with respect to deposit of copies and registration of such work shall have been complied with. July 30, 1947, c. 391, Sec. 61 Stat. 652."

Therefore, since plaintiffs did not obtain copyright registration for the rhinestone-studded articles depicted in exhibits 3, 7, 10, 11, 15, 18, 21, 26, 27, 34 and 37, nor deposited copies of the same in the Copyright Office, there can be no maintenance of suit thereon and infringement thereof cannot be sustained.

The addition and location of the simulated diamonds or rhinestones considerably changes the style, design and appearance of the tailored pieces and to such an extent as to give the plaintiffs the advantages of giving them style numbers different from and selling them at much higher prices than the tailored pieces. The public purchases the same because of their different appeal, appearances and designs.

These rhinestone-studded items appeal to the tastes of individuals who might not be attracted to the tailored items. With respect to the textured (rope design) appearance running throughout all of the items, the plaintiff Boucher admits that this design, appearance and effect is old in the art. [Boucher's Deposition pp. 47, 50, 51]. Boucher also admits that by adding stones it would make the articles more artistic [Boucher's Deposition p. 59].

It is well known in Copyright Law that a revised or altered edition or new compilation of a work must have a separate copyright from that of its original work. Section 7 of the Copyright Law states that "work republished with new matter shall be regarded as a new work subject to copyright under the provisions of this title." See also Kamenstein's Deposition [D 218a-220a].

> Q7 Does a new edition of a copyrightable work have to have a new copyright notice thereon?
>
> A7 The question is not clear as to what is meant by "new edition" or the kind of notice; it might refer to a great variety of situations. In general, however, the law requires that a notice of copyright appear on every published copy of a work, with certain stated exceptions. This is true whether the "new edition" is a reprint of a "new version" containing new copyrightable matter.
>
> Q8 Does a new edition as applicable to books also apply to artistic jewelry?
> A8 The import of this question is not clear. In general, the same consideration, with respect to copyright, would apply to books and jewelry. If a book is a reprint, without new matter, the Copyright Office would not register it; if it is a new version, containing substantial additions and revisions, registration could be considered if the requirements concerning publication and notice have been met. The same may be said for jewelry; Section 7 draws no distinctions as to the type of work involved.
>
> Q9 Does the adding of rhinestones to a piece of artistic jewelry as opposed to its omission constitute a new edition?
> A9 This would depend entirely upon the particular

work in question. If enough were added, and in such a way as to create what might be considered a "new work" within the meaning of Section 7, registration would be considered.

Usually, however, the addition or omission of rhinestones in the ordinary case -- in substitution for another jewel -- would not constitute copyrightable "new matter."

Q10 Does the adding of rhinestones to a piece of artistic jewelry as opposed to its omission constitute a revised edition?
A10 We would make no distinction between a new or revised edition. Section 7 speaks both of "other versions" and of "works republished with new matter."

* * *

Q16 Would the Copyright Office refuse to issue a certificate of a claim to copyright on a work because it includes subject matter common to a work to which a certificate to a claim to copyright has already been issued?
A16 No. Section 7 of Title 17 provides that "works republished with new matter, shall be regarded as new works subject to copyright ..."

Plaintiffs have elected to consider these pieces as different in design and artistic creation by giving them different style numbers and selling them at much higher prices (about 50% higher) [D 208a and 209a] than its tailored pieces. It is well established in copyright law that a revised or altered edition or new compilation of a work must have a separated copyright from that of its original work. Section 7 of the Copyright Law states:

> "work republished with new matter shall be regarded as a new work subject to copyright under the provisions of this title."

6. The District Court Erred In Holding that With Respect to Copyrights GP 7115, Class G; GP 7123, Class G; GP 7106, Class G and GP 7109, Class G, The Articles of Costume Jewelry Published and Sold Thereunder Had The Proper Statutory Copyright Notice Affixed Thereto Required By the Copyright Law.

Section 19 of the Copyright Law reads as follows:

"Notice; form

> The notice of copyright required by section 10 of this title shall consist either of the word "Copyright", the abbreviation "Copr.", or the symbol c, accompanied by the name of the copyright proprietor, and if the work be a printed literary, musical, or dramatic work, the notice shall include also the year in which the copyright was secured by publication. In the case, however, of copies of works specified in subsections (f) to (k) inclusive, of section 5 of this title, the notice may consist of the letter c enclosed within a circle, thus (c), accompanied by the initials, monogram, mark, or symbol of the proprietor; provided that on some accessible portion of such copies or other margin, back, permanent base, or pedestal, or of the substance on which such copies shall be mounted, his name shall appear . * * * "

Plaintiffs in the applications for copyright registrations (see plaintiffs' Exhibits 4, 8, 12, 16) gave the name of the copyright claimant as "Marcel Boucher d/b/a Boucher", the date of the first publication as June 14, 1954, and the wording of the copyright notice appearing on the work as "(c) Boucher". However, Marcel Boucher did not file anywhere a Certificate of Conducting Business under "Boucher" until August 10, 1954, about two months after he used that assumed abbreviation. [D 29a-33a], defendants' Exhibit "K".

It is respectfully submitted that the said copyrights are invalid and ineffective.

Section 440 of the Penal Law of the State of New York reads as follows:

> "440. Filing certificates by persons conducting business under an assumed name or as partners. 1. No person shall hereafter (a) carry on or conduct or transact business in this state under any name or designation other than his real name * * * unless such person shall file with the office of the clerk of each county in which such business is conducted or transacted a

> certificate setting forth the name or designation under which and the address within the county at which such business is conducted or transacted, the full name or names of the person or persons conducting or transacting the same, * * * with the residence address of each person * * * ."

The Certificates of Registration were issued September 21, 1954, and the date that the works were first placed on sale, sold or publically distributed, is given in their certificates as June 14, 1954. These certificates state that the wording of copyright notice appearing on the work is © Boucher, stamped on the back of the earring.

On June 14, 1954, the trade name "Boucher" did not exist, and as a publication or sale was first made on June 14, 1954, it was without the proprietor's name as required by section 19 of the Copyright Law.

The evidence showed that the plaintiffs published these articles of costume jewelry on June 14, 1954 with a copyright notice which included a trade name (Boucher) not yet in existence, since, as evidenced from the certificate of conducting business (Exhibit K) plaintiff Marcel Boucher was not conducting business as "Boucher" in June 14, 1954, and, therefore, such notice was erroneous and invalid. The said certificate (Exhibit K) clearly shows that Marcel Boucher commenced to transact or conduct business under the trade name "Boucher" in August 9, 1954. The evidence points to the fact that what happened was that the plaintiffs did not publish the said works with the copyright notice "Boucher" on June 14, 1954, but with the symbol or trade mark of a Phrygian design. (See defendants' Physical Exhibit L); that he applied for copyright registration on the items bearing the trade mark or symbol in lieu of the proprietor's name after the plaintiffs had published the same with such erroneous copyright notice, that the

same was rejected by the Copyright Office and that he then filed the certificate of doing business as Boucher and marked his products with the "Boucher" copyright notice.

It is well established that when a commercial trade name is used to denote the proprietor, it must be legalized in the state where he conducts business, for it is not to be supposed that Congress intended to permit the use of a name in a notice which it would be against the law to use in a state where proceedings are brought, Haas v. Leo Feist, 234 F. 105; Howell "The Copyright Law", 1952. In the case just cited the Court expressed the opinion that one may use a duly legalized fictitious name in the notice and register his claim in the real name, and vis versa.

From June 14, 1954, up to August 10, 1954, the date of the filing of the Certificate of Conducting Business by Marcel Boucher in the New York County Clerk's Office, there was no legal record to disclose that Marcel Boucher did business under "Boucher." There are at least 50 persons listed in the New York City telephone directories alone whose family name is Boucher. Thus, the actual full name or trade name of the copyright proprietor was not known until August 10, 1954, a date almost two months after the date of publication of the works with "Boucher."

7. The District Court Erred In Holding That The Basic Designs Of Plaintiffs' Costume Jewelry Are Original.

A common or basic design or common texture runs throughout all of the copyright works. This design and this texture feature are characteristic of a particular line manufactured and sold by plaintiffs. It is what is known as a rope texture and has been used for a considerable time prior to its adoption by the plaintiffs.

Plaintiffs' witness Boucher admitted that such rope texture as applied to jewelry is old. The Court agreed with the witness.

MR. SPARROW: But he says rope texture is old.

THE COURT: Of course, all of this is old. All of this twisted rope design did not originate with Boucher, nor did this hob nail effect originate with Boucher. That is as old as the hills, we might say. I guess it is as old as art is. You see it in ancient jewelry produced in ancient Egyptian jewelry."

This being a fact, what has the plaintiff Boucher originated? If anything at all may be considered a work of art, then it is the design and arrangement of the rhinestones in the pieces. But plaintiffs did not copyright a single one of the "semi-tailored" articles of costume jewelry, that is, the ones studded with the rhinestones.

8. The District Court Erred In Holding That The Individual Defendants Deliberately Copied Plaintiffs' Copyrighted Articles of Costume Jewelry, Used The Plaintiffs' Articles As Models From Which Rubber Molds Were Made, And That Identical Reproductions of Plaintiffs' Articles Were then Produced in The Rubber Molds.

Defendant, B. Steinberg-Kaslo Co. did not use plaintiffs' copyrighted "tailored" articles of costume jewelry as models to make their pieces, but purchased the uncopyrighted "semi-tailored" pieces, removed the rhinestones, plug the holes and made them into "tailored" pieces. [D 33a].

As the "semi-tailored" pieces were not copyrighted, said defendant felt free to alter the same and then using these altered pieces, as models to make its own pieces.

9. The District Court Erred In Ordering And Decreeing A Permanent Injunction Against the Defendants Enjoining And Restraining The Latter From Publishing, Selling, Manufacturing And Marketing Their Articles of Costume Jewelry in Suit And In Holding That Plaintiffs Recover Defendants' Net

Profits Derived From The Sale Of All of The Articles Of Costume Jewelry In Suit.

The District Court should not have granted the injunction, recovery of profits and allowance of counsel fees for the reasons fully set out in paragraph numbered 1 hereinabove.

Furthermore, if any of the copyrights are held invalid or ineffective or not infringed by this Court of Appeals, then plaintiffs are not entitled to the amounts stated in the final judgment.

C O N C L U S I O N

The judgment below should be reversed and judgment entered in favor of the defendants dismissing the complaint; the judgment below should be reversed which holds that plaintiffs' copyrights GP 7106 Class G; GP 7115 Class G; GP 7123 Class G; GP 7109 Class G; GP 7849 Class G; GP 7866 Class G; GP 7851 Class G are valid and infringed; which holds that plaintiffs Pin Style No. 5878 (Ex. 3); Earrings Style No. 5836 (Ex. 7); Pin Style No. 5817 and Pin Style No. 5859 (Exs. 10, 11); Necklace Style No. 5837 and Necklace Style No. 5838 (Exs. 14, 15); Earrings Style No. 5918 (Ex. 18); Pin Style No. 5946 (Ex. 21); Pin Style No. 5971, Pin Style No. 5945, Earrings Style No. 5984 and Earrings Style No. 5983 (Exs. 26, 27, 28, 29); Pin Style No. 5921 (Ex. 34); and Earrings No. 5922 (Ex. 37) are covered respectively by copyrights GP 7106 Class G, GP 7115 Class G, GP 7123 Class G, GP 7109 Class G, GP 7849 Class G, GP 7855 Class G, GP 7866 Class G, GP 7850 Class G, and GP 7851 Class G, and the complaint should be dismissed with respect thereto; and the judgment should be reversed which holds that the plaintiffs recover the amounts stated in the judgment.

MAXWELL E. SPARROW
Attorney for Defendants-Appellants
535 Fifth Avenue
New York 17, N. Y.

JEWELRY

See Copyright Privilege Abuse: Many 'Originals' Called Copies

By BERNARD GROGER

THE practice of copyrighting costume jewelry to protect designs from being pirated has become widespread in the industry, but in some instances the privilege has been seriously abused.

In the past two years, during the run on the copyright office, certain styles have been granted protection that are actually not original, many in the industry assert.

Since Judge Alexander Bicks handed down an opinion in September, 1955, upholding the right of a jewelry producer to protect his designs under the copyright laws, many firms in the trade have literally become copyright-happy.

Only a cursory search of back records is usually made before a copyright is granted. The door is thus left wide open for practically any style to be approved and sanctioned as "original." Under the design patent protection system used earlier a lengthy search was necessary before a style was passed on.

In infringement litigation the burden of proof of prior use shifts to the defendant and it becomes his responsibility to prove that a design that was granted a copyright actually was in existence previously. However, the courts have not been sympathetic to this form of defense. The copyright holder usually makes some changes in styling and the resulting modern adaptation is called an original.

Many veteran jewelry men, while not condoning style piracy, object to the ease with which any firm can have a style registered as an "original." Many in this camp feel there are only a minute number of really new designs among the styles granted copyrights and that most socalled originals are nothing more than direct duplications or adaptations of precious jewelry pieces or styles that have existed for years.

What the copyright is doing to the industry, one producer remarked, is inflating the ego of many who have no originality in their lines and making them think that since protection was granted they really have some original style sense.

* Trifari, Krussman & Fisher, Inc. v. Charel Co., Inc. 134 Fsupp 551; 107 USPQ 48

COSTUME JEWELRY ARTICLES SUBMITTED BY PLAINTIFFS TO COPYRIGHT OFFICE FOR COPYRIGHT AND CERTIFICATES OF REGISTRATION ISSUED THEREON.						ARTICLES OF COSTUME JEWELRY CLAIMED BY PLAINTIFFS UNDER SAME COPYRIGHTS	
Pltfs' Trial Ex. No.	Certificate of Registration of Copyright. No. and Date	Date of Publication	Pltfs' Trial Ex. No.	Corresponding Ex. No. in Complaint	Title of Copyrighted Work	Pltfs' Trial Ex. No.	Costume Jewelry Article Claimed by Plaintiffs under same copyright. Style and No.
8	GP 7115 G-Sept. 21,1954	June 14, 1954	6	1	Earring-Style No. 5807 (Tailored)	7	Earring-Style No. 5836 (Semi-tailored)
12	GP 7123 G-Sept. 21, 1954	June 14, 1954	9	2	Pin- Style No. 5816 (Tailored)	10 11	Pin- Style No. 5817 (Semi-tailored) Pin- Style No. 5859 (Semi-tailored)
16	GP 7109 G-Sept. 21, 1954	June 14, 1954	13	5	Necklace- Style No.5831 (Tailored)	14 15	Necklace- Style No. 5837 (Tailored) Necklace- Style No. 5838 (Semi-tailored)
4	GP 7106 G-Sept. 21, 1954	June 14, 1954	2	11	Pin- Style No. 5877 (Tailored)	3	Pin- Style No. 5878 (Semi-tailored)
19	GP 7849 G-Mar. 9, 1955	Jan. 2, 1955	17	15	Earring- Style No. 5917	18	Earring- Style No. 5918 (Semi-tailored)
22	GP 7855 G-Mar. 9, 1955	Jan. 2, 1955	20	17	Pin- Style No. 5928	21	Pin- Style No. 5946 (Semi-tailored)
24	GP 7856 G-Mar. 9, 1955	Jan. 2, 1955	23	19	Pin- Style No. 5929	- -	- - - - - - - - - - - - - - - - - -
30	GP 7866 G-Mar. 9, 1955	Jan. 2, 1955	25	20	Pin- Style No. 5947 (Tailored)	26 27 28 29	Pin- Style No. 5971 (Semi-tailored) Pin- Style No. 5945 (Semi-tailored) Earring- Style No. 5983 (Tailored) Earring- Style No. 5984 (Tailored)
32	GP 7847 G-Mar. 9, 1955	Jan. 2, 1955	31	23	Necklace- Style No.5913	- -	- - - - - - - - - - - - - - - - - -
35	GP 7850 G-Mar. 9, 1955	Jan. 2, 1955	33	26	Pin- Style No. 5919	34	Pin- Style No. 5921 (Semi-tailored)
38	GP 7851 G-Mar. 9, 1955	Jan. 2, 1955	36	28	Earring- Style No. 5920	37	Earring- Style No. 5922 (Semi-tailored)

RELEVANT DOCKET ENTRIES

[Excerpts from transcripts of Nov. 26, 27, 28 and Dec. 12, 1956.]

July 7, 1955	Filed Complaint and Issued Summons
July 15, 1955	" Summons and return, served DuBoyes, Arke, Inc. Capri Jewelry, B. Steinberg-Kaslo Co., Volupte, Inc., W. Heimler, Inc. 7-11-55
Aug. 3, 1955	" Answer & Counterclaim of defts. Capri Jewelry, et al.
Aug. 20, 1955	" Filed Answer & counterclaim of deft. DuBoyes, Inc.
Aug. 22, 1955	" Answer of deft Arke, Inc.
Sept. 24, 1955	Filed pltff's reply to counterclaim of deft DuBoyes, Inc.
Sept. 24, 1955	Filed pltff's reply to counterclaim of deft. Capri Jewelry, Inc. etal.
Nov. 1, 1956	" stip. & order amending answer-Edelstein, J.
Dec. 12, 1956	Trial cont'd & concluded-Complaint for unfair competition dismissed. Decision in pltff's favor on infringement. Findings, etc. to be settled on notice and submitted. Proposed decree and order directing accounting also to be submitted. Counterclaim dismissed.
Jan. 7, 1957	" findings & conclusions-Ryan, J.
Jan. 7, 1957	" interlocutory judgment-Defendants enjoined; William S. Evans, 75 Maiden Lane, NYC appointed Special Master to hear and report in relation to damages and profits, etc.-Ryan, J.-Mailed notice of entry 1-8-57
Jan. 30, 1957	Filed notice of appeal by defts.-Mailed copy to Forsyine McG & F 1-31-57
Mar. 25, 1957	" notice of certification of record to USCA
Aug. 14, 1957	Filed report of Special Master.
Aug. 14, 1957	Filed exhibits before Special Master.
Sept. 19, 1957	" order fixing compensation of Special Master at $2,665.00-Ryan, J.
Oct. 1, 1957	" pltffs' bill of costs taxed at $980.43
Oct. 1, 1957	Filed judgment No. 61,804. Report of Special Master confirmed; pltffs' attys fee fixed in sum of $10,000.00. Pltffs recover of defts total sum of $31,776.89 (see judgment) together with costs as taxed in sum of $980.43-Ryan, J.-Mailed notice of entry 10-3-57
Oct. 10, 1957	" defts' notice of appeal-Mailed copy to Forsythe McG&F 10-11-57
Oct. 10, 1957	" Supersedeas bond-$36,700.00-U.S. Fid & Guar Co.

United States District Court

Southern District of New York

MARCEL BOUCHER, doing business as BOUCHER, and MARCEL BOUCHER and JEANNE BOUCHER, doing business as MARCEL BOUCHER ET CIE, Plaintiffs vs. DU BOYES, INC., ARKE, INC., CAPRI JEWELRY INC., JULES STEINBERG and L. SLOVITT, doing business as B. STEINBERG-KASLO COMPANY, VOLUPTE, INC. and WALTER HEIMLER, INC. Defendants.	Civ. 102-19

Before:

HON. SYLVESTER J. RYAN,
District Judge.

New York, November 26, 1956;
2.00 o'clock p.m.

APPEARANCES:

FORSYTHE, McGOVERN & FETZER, ESQS.,
Attorneys for Plaintiffs;
Thomas A. McGovern, Esq., and
Burton L. Knapp, Esq., of Counsel.

MAXWELL E. SPARROW, ESQ.,
Attorney for Defendants;
Maxwell E. Sparrow, Esq., and
William V. Pesce, Esq., Of counsel.

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[Page 3, lines 7 - 10]

M A R C E L B O U C H E R , one of the plaintiffs, called as a witness on behalf of the plaintiffs, being first duly sworn, testified as follows:

DIRECT EXAMINATION BY MR. KNAPP:

* * *

[Page 35, lines 8 - 18]

Q Have you ever authorized anybody, Mr. Boucher, to make a version of Plaintiffs' Exhibit 6 in evidence without a copyright notice on it? A Yes, we did.

Q Would you describe the circumstances under which you did that. A When we found out that all this group has been copying and that those pieces were difficult to sell, that we were getting a lot of returns from customers on account of pieces being on the market much cheaper than the originals--

* * *

[Page 36, line 1 to Page 37, line 13]

THE WITNESS: Yes. We formed a different division in order to try to manufacture--ourselves to manufacture--

THE COURT: Who formed a different division?

THE WITNESS: We did, Marcel Boucher & Co. We took some of our pieces that were already copied and we started to make them, using the same process that they found we are doing, that is to say, plain casting and just vacuum plated it, which is a new process by which you don't need to polish the piece. That is sort of a lacquer--gold-colored lacquer to cover over the imperfections of the metal, and it gives a finish similar to the gold-plated pieces.

THE COURT: You don't do any polishing or tumbling?

THE WITNESS: No polishing, no tumbling, nothing, just take out the piece from the mold, solder the joint and catch and send them out to be vacuum-plated, that's all.

Q When did you authorize the use of Plaintiffs' Exhibit 6

for reproduction without a copyright notice? Would you give us the exact date as best you can remember. A As best I can remember, it was in the fall, in September 1955. [37]

Q Did the same thing happen with respect to any of the other pieces that are in this suit? A That's right.

Q Did the same thing happen with respect to any of the other pieces? A No, only this.

Q Only on Plaintiffs' Exhibit 6? A That's right.

Q And the rest are being made, if they are being made today, with copyright notices; is that correct? A That's right.

* * *

[Page 65, line 14 - Page 66, line 23]

THE COURT: For instance, take this Exhibit 37, which is a pair of earrings.

THE WITNESS: That's right.

THE COURT: These are not symmetrical earrings. One is a right earring, and the other is a left earring.

THE WITNESS: That's right. In that case we do put copyright notices on one earring.

THE COURT: Only on one?

THE WITNESS: Yes, and the style number on the other.

[66] THE COURT: Then I think you lost your copyright, if that is your pattern. I am talking to your lawyer. I think you have lost your copyright on that by having a publication without notice.

MR. KNAPP: Well, our position is --

THE COURT: All right. That is just my feeling. Where you have marketed a product without notice, as you

have here, marking only one of two separate and distinct earrings, both, of course, constituting a pair, one designed for the right and the other for the left and in reverse pattern, and where you only marked one earring, you have a marketing then of the other earring without notice of copyright, and I think you forfeited your right.

MR. KNAPP: Our position is that we never sell one earring. We sell two earrings, and a notice on one is simply a notice on the design.

THE COURT: No. I think you will find cases to the contrary. For instance, you will find a number of cases involving book ends. Of course, to have bookends you have to have a pair, and in every case I ever came across both bookends had to be marked with the copyright notice.

* * *

[Page 67, line 14 - Page 70, line 3]

THE COURT: I will simply point this out to you as an observation which I make which you can turn over in your mind, and, if you have anything that you want to refer to me -- I don't want a long memorandum -- like one case or just give me the citation, I will look up my own law.

MR. KNAPP: We have to keep in mind that this field of copyrights on jewelry is a relatively new one, and I will keep that point in mind.

THE COURT: It is relatively new, but each earring constitutes a separate marketing, and each product must be marked with a notice of copyright, and I think that, where you have marketed a pair of earrings, you are required by the law to

mark with a copyright notice both of the pair.

Am I correct, Mr. Boucher, in saying that in some pairs of earrings there is a right earring and a left earring?

THE WITNESS: That's right.

THE COURT: And in other pairs of earrings they are interchangeable?

THE WITNESS: When it comes to the left and the right, they cannot sell one earring. That is impossible.

THE COURT: I don't know about that. Mr. Boucher, these earrings might also be used as small dress clips, is that right?

THE WITNESS: Well, they could.

THE COURT: For instance, give me one of those earrings, that last one that I spoke about.

THE WITNESS: We had quite a bit of --

THE COURT: For instance, take this Exhibit 24. This might be used as an earring. This would be the left earring, would it not?

THE WITNESS: That's right.

[69] THE COURT: And it might also be used as a dress clip, is that right?

THE WITNESS: Yes.

THE COURT: One of the ladies might put one on the right side of the neck--

THE WITNESS: That's right.

THE COURT: -- and the other on the left side of the neck.

THE WITNESS: It is only small clips like that would be

used mostly by pair.

THE COURT: But these can be used separately as dress clips, separate dress clips or handkerchief clasps to clip a lace or fancy handkerchief to the costume.

THE WITNESS: May I explain something on that? When you have a small piece like that, where we have to put both the style number and the copyright notice, in many instances you hardly have any surface. It happened on this particular area you may have enough surface to put both of them.

THE COURT: The law requires that the notice be put on the article. All right.

THE WITNESS: You know, the customer objects that there are too many names on the back of the pieces. [70]

THE COURT: I know your problem, but I did not make the law.

* * *

[Page 71, line 4]

New York, November 27, 1956

* * *

[Page 72, line 1 - Page 81, line 1]

M A R C E L B O U C H E R , resumed.

DIRECT EXAMINATION CONTINUED BY MR. KNAPP:

Q Mr. Boucher, coming back to something that was testified to yesterday, I wish to show you again Plaintiffs' Exhibit 38 in evidence, a pair of asymmetrical earrings, style No. 5920. Mr. Boucher, does that exhibit consist of a left earring and a right earring? A It does.

Q In the course of your experience --

THE COURT: I think we had better have him state it.

Would you tell us the difference between what you described as a left earring and a right earring?

THE WITNESS: Well, the left earring is worn on the left ear, and the outline is the exact opposite of the right earring. That is to say, you have to make two models, one for the right and one for the left earring, you see, and one earring cannot be worn on the two ears, left and right. One belongs to one ear, and the other one belongs to the other.

THE COURT: And both earrings follow the contour of the--

[73] THE WITNESS: Of the lobe.

THE COURT: -- mandible and of the cheekbone and of the ear.

THE WITNESS: Yes.

THE COURT: There are some earrings, are there not, which are interchangeable?

THE WITNESS: That's right.

THE COURT: Where it makes no difference whether a woman puts it on her right ear or her left ear.

THE WITNESS: That's right.

THE COURT: They are identical.

THE WITNESS: That's right, your Honor.

Q Mr. Boucher, in connection with a pair of earrings, such as on Exhibit 28 where there is a left earring and a right earring, are both earrings made --

THE COURT: You mean Exhibit 38.

MR. KNAPP: Exhibit 38, yes.

Q (Continuing) Are both earrings made at the same time by you? A They are.

Q When the earrings are submitted to the Copyright Office, how are they submitted? [74] A They are submitted by pairs, mounted on a card, and under "Description" it says the copyright stamp on back of one earring. We never had any difficulty. We always have been submitting our earrings that way, and we never had any difficulty.

THE COURT: Is there any difference in the construction of a clasp which is used on a pair of earrings and a clasp which is used on a larger piece of jewelry similar to a brooch or a pin?

THE WITNESS: Yes.

THE COURT: Will you tell us what the difference is?

THE WITNESS: Well, on a clasp we use on a dress clip I would say you have a clasp with sort of prongs to grip on the material.

THE COURT: With pointed prongs.

THE WITNESS: Pointed prongs.

THE COURT: May those clasps be used on earrings?

THE WITNESS: They cannot, your Honor.

THE COURT: Why not?

THE WITNESS: Because they will cut the ear.

THE COURT: The prongs will pierce the ear, the flesh of the ear?

[75] THE WITNESS: That's right.

THE COURT: All right. What is the purpose of these prongs on the clasps on these clips? What purpose does it

serve?

THE WITNESS: On a dress clip, you mean, your Honor?

THE COURT: Yes.

THE WITNESS: That is to hold the said clips on the dress or on the material.

THE COURT: On the material.

THE WITNESS: On the material.

THE COURT: I see. So that it does not slip?

THE WITNESS: That's right, your Honor.

BY MR. KNAPP:

Q Mr. Boucher, was it the practice of the Copyright Office after the earrings on Exhibit 38 or, for that matter, any other earrings were submitted to it to return the earrings to you on the same card on which you sent them to the Copyright Office? A Yes, they usually return them on the same card.

Q They came back the same way? A That's right.

[76] Q In your experience, which goes back 40 years as a jeweler, have you ever had occasion to sell one earring to anybody? A No, except for repair when they lose one earring. We supply the other. But otherwise we never sell one earring alone.

Q When a customer purchases an earring, habitually the customer purchases a pair of earrings? A He usually does.

Q Which is two earrings? A That's right.

Q In connection with Plaintiffs' Exhibit 8 in evidence, which appears to be a turban earring, style No. 5807, where on the earring did you place the copyright notice? A On the back of the earring.

Q Was that on both earrings? A It must be on both

earrings because this is not left and right.

THE COURT: That is, where the same, identical earring--

THE WITNESS: Yes, where it is the same identical earring like this one, for instance, then the notice is on both earrings.

[77] THE COURT: Where there is not a left and right, you put the copyright notice on both earrings.

THE WITNESS: Well, it is because there is only one model for the two. Your Honor, it may be that there is an exception to that. We had one earring which was not left and right on which the copyright notice was only on one earring, but that was because this particular earring was quite difficult to cast, and the impression of the copyright would not have come clearly after casting. That is why we decided to put right on the side of this earring, on one earring, the copyright notice and, on the other one, the style number of that earring, you see. That happened only on one number.

Q Mr. Boucher, the testimony which you just gave, does that refer to Plaintiffs' Exhibit 19 in evidence? A It does.

Q And on that piece you stamped the copyright notice on one earring-- A Yes.

Q --even though the earrings are interchangeable.

[78] A That's right. That is the only one earring on which we have the number on only one earring-- the notice on only one earring.

Q Except for Exhibit 19. A That is right.

Q On all other earrings which are interchangeable the copyright notice appears on both earrings. A That's right.

Q Mr. Boucher, I show you Plaintiffs' Exhibit 30 in evidence which purports to show a copy of style No. 5947, a pin. Mr. Boucher, I believe we put in evidence yesterday an earring following what we claim to be the basic design of 5947, is that correct?

A That's right.

Q On how many of the earrings in Exhibit 30 did you insert the copyright notice? A I think it was four pairs of earrings.

Q All following what we claim to be the design of style No. 5947? A That is correct.

Q Exhibit 30. And on how many of those earrings --

[79]

THE COURT: You have only introduced three in evidence.

THE WITNESS: Three; you are right, your Honor.

THE COURT: 27, 28 and 29.

THE WITNESS: That's right, that is three.

THE COURT: 27 is with the rhinestones and sapphires; 28 is plain; and 29 is the ruby and rhinestones.

MR. KNAPP: If I may clear this up, your Honor, there were two earrings only from that basic design, Exhibits 28 and 29.

THE COURT: Those are with rhinestones.

MR. KNAPP: 28 is plain. 29 is with colored stones.

THE COURT: 28 is plain. 27 is with rhinestones and sapphires.

MR. KNAPP: 27 is a pin.

THE COURT: A pin with rhinestones and sapphires.

MR. KNAPP: That's right.

THE COURT: And 29 has rhinestones and rubies.

MR. KNAPP: Earrings.

THE COURT: Earrings.

MR.KNAPP: That is correct.

[79-A] THE COURT: You have two pins and two pairs of earrings.

MR. KNAPP: Three pins and two pairs of earrings.

THE COURT: One, two, three, right. There are three pins and two earrings. That is right.

MR. KNAPP: That is correct.

[80] Q I am showing you Exhibit 28, Mr. Boucher. I want to ask you whether the copyright notice on Exhibit 28 appears on one or both earrings. A On 28 they appear on only one earring.

Q Mr. Boucher, did you ever sell to anybody the reproduction of Plaintiffs' Exhibit 28 without selling two earrings?

A Not to my knowledge.

Q You never sold one earring? A No.

Q Have you ever had a demand upon you in your business to sell somebody one earring? A No.

Q And when you submitted Exhibits 28 and 29 to the Copyright Office, did you submit two earrings for each piece?

A We did.

Q And did the Copyright Office return those pieces to you?

A Yes, they did.

Q Were they returned on the same card? A On the same card.

Q On which you sent them to the Copyright Office?

[81]
A That's right.

* * *

[Page 91, lines 19 - 24]

CROSS-EXAMINATION BY MR. SPARROW:

Q Mr. Boucher, is it your contention that the basic design of the copyright items runs through the entire line? A I don't think so, no, it isn't.

* * *

[Page 92, line 20 - Page 93, line 6]

Q In other words, you considered the entire line as comprising a basic idea or basic design, is that not right?

MR. KNAPP: Objection. That is a conclusion by counsel.

[93] THE COURT: Overruled. This is cross-examination.

A It is not a basic design. Texture is not a design. Texture is an ornamentation. It can be a straight line. It happened to be a twisted wire effect, but that is not a design.

* * *

[Page 96, line 4 - Page 101, line 12]

Q Mr. Boucher, I show you what purports to be a pair of earrings mounted on a card--

THE COURT: Defendants' Exhibit A for identification.

Q --Defendants' Exhibit A, and I ask you to tell me whether this is of your manufacture? A Yes, it is.

Q Would you call that a right earring and a left earring?

A No. These are the earrings I just referred to.

MR. KNAPP: I suggest that we have it in evidence since it is identified as --

THE COURT: If you are going to ask the witness about it, you had better introduce it in evidence.

MR. SPARROW: I offer Defendants' Exhibit A in evidence.

THE COURT: Any objection?

[97]

MR. KNAPP: I haven't looked at them, but there is no objection.

THE COURT: Received.

(Defendants' Exhibit A for identification received in evidence.)

THE COURT: Do they have a style number?

MR. SPARROW: That is similar to Exhibit 17, your Honor.

THE COURT: That is style No. 5917.

What is your purpose in introducing this pair in evidence?

MR. SPARROW: I want to show, your Honor, that this pair of earrings -- it isn't a right and left. They are both identical, and, if you look at it, one has a number, and the other has a copyright notice. There is no copyright notice on both.

It is my understanding from the testimony that the witness had testified that only on the earrings, a pair of earrings where you have a right and left, does he put the style number on one and the copyright notice on the other.

THE COURT: No. My recollection is that he testified that in some cases, even though the earrings were identical in construction, if the nature of the casting made it impractical

[98]

to put the copyright notice on both earrings, he only put them on one and put the style number on the other.

Was that your testimony?

THE WITNESS: Yes.

MR. KNAPP: Specifically with respect to that piece, your Honor.

THE COURT: Wait, please, counselor. You are not testifying. He did not say that.

THE WITNESS: Yes, your Honor. Those are the earrings that I was referring to.

THE COURT: Now he says it. All right.

MR. SPARROW: The reason why I want that in evidence, your Honor, is to show that the idea of just marking one earring with a copyright notice is applicable both to those pairs of earrings where you have a left and a right and when you have them both alike.

THE COURT: What about the casting of this earring which has been marked in evidence as Defendants' Exhibit A which made it impractical for you to mark it copyrighted?

THE WITNESS: I can explain that to you, your Honor, if I have your permission to get that exhibit -- the mold on which that is.

[99] MR. KNAPP: That one is not in evidence.

THE COURT: If he wants to introduce it in evidence, introduce it in evidence.

MR. KNAPP: This is Plaintiffs' Exhibit 5.

THE WITNESS: This is the one that I want.

MR. KNAPP: Can't you do it with that one and save time, Mr. Boucher?

THE WITNESS: You see, your Honor--

THE COURT: Wait. Do you want to put this rubber mold in evidence? Is this the rubber mold for some of your pieces?

THE WITNESS: That's right.

THE COURT: Mark it in evidence.

(Marked Plaintiffs' Exhibit 43 in evidence.)

THE COURT: You say you want to show me, by using Exhibit 43 in evidence, why it was impractical for you to mark on Defendants' Exhibit A, on both earrings, notice of the copyright, is that right?

THE WITNESS: That's right, your Honor.

THE COURT: All right. Now explain it.

You had better come up here, Mr. Sparrow, so you can hear what is going on.

THE WITNESS: You can see, your Honor, that on that [100] particular piece there is quite a bit of what we call undercut, you see. In order to get this, we have to build up the mold this way on the side.

In here, on this part of the mold, if we had both the number and the name, you see, either the number or the name will come on the side of the mold, and, when you pull this, after a while neither the number nor the copyright notice will come out clear on the casting.

THE COURT: So that, if I understand you, where you have a curved surface casting, it is impossible to put too much printing or numbers upon it.

THE WITNESS: On the inside where the surface is very curved.

THE COURT: What was there to stop you from applying a copyright notice by means of a die and a hammer after casting?

THE WITNESS: Well, that could have been done, I

agree with you, your Honor, but we never had any remark from the Patent Office of using our copyright on one earring, so we thought that we would do it that way. That is the easiest way to do it, you see.

[101] THE COURT: What I would like to know is this, Mr. Boucher: was the copyright notice left off of one of these pair of earrings because it was impossible to affix it, or was it left off because you did not believe it to be required by law?

THE WITNESS: Well, it was done because it was difficult to have it done that way, you see, and, then, of course, because so far we never had any complaint about the marking of only one earring, complaint from the Patent Office.

You know, they were very strict on the marking of our pieces.

* * *

[Page 102, line 17 - Page 103, line 24]

THE COURT: In this number, this pair of earrings, Defendants' Exhibit A, you have marked a notice of copyright in one and only one of the two earrings.

THE WITNESS: That's right.

THE COURT: Do you say that it would have been impossible to have put the copyright notice in the other earring in the casting where you placed the style number?

[103]

THE WITNESS: It is not impossible to put it in there, but after a very short while the copyright notice could have been -- would be very blurred. You see what I mean? You could not see it.

THE COURT: Would it have been any more blurred than

the style number is?

THE WITNESS: But the same thing would happen for the style number.

THE COURT: Was it impossible for you to use a die and a hammer to put on a copyright notice on both of these earrings of Exhibit -- Defendants' Exhibit A?

THE WITNESS: Well, it would have been possible, but bear in mind also the fact that you have a very, very sharp curve, you see.

THE COURT: Did you ever use in any of these numbers in suit a metal die and hammer for the purpose of affixing either your name or any other notice on the article that was produced?

THE WITNESS: We do it sometimes on necklaces, where the pieces are the same, you know.

THE COURT: All right.

* * *

[Page 111, line 16 - Page 115, line 22]

Q Mr. Boucher, I show you Defendants' Exhibit No. C for identification and ask you whether the necklace depicted or shown there is of your manufacture. A Yes, it is.

Q You recognize it as being of your manufacture?

A Yes.

Q Will you point out to the Court any copyright notice which appears on that necklace, Exhibit C?

MR. KNAPP: Has that been put in evidence?

[112] MR. SPARROW: I am sorry. I offer the necklace in evidence, Defendants' Exhibit C.

MR. KNAPP: What is the style number?

MR. SPARROW: Equivalent to style No. 15.

MR. KNAPP: Style No. 5838, Exhibit 15.

No objection.

THE COURT: Received in evidence.

(Defendants' Exhibit C for identification received in evidence.)

Q Will you point out to the Court a copyright notice on that necklace, Exhibit C, if it does appear? A Well, I don't see no copyright notice, but I see one tag that doesn't belong to this -- that wouldn't be sold with the necklace because we don't use those tags any more.

Q No? I show you a photograph marked Plaintiffs' Exhibit 6 attached to the complaint and ask you whether that is not the same tag which appears on Exhibit C? A It is.

Q Just answer yes or no. A Yes, it is. I am sorry. It is maybe one of the old ones.

[113]

Q Will you change your answer now? A I see it on the photograph, but I don't know if it was sold with this, on this particular necklace.

Q Does that depict the article, Exhibit 6, attached to the complaint? A I want to point out that--

Q Just answer yes or no, Mr. Boucher. A Yes, but I want to point out that that was one of the very first items.

THE COURT: Counsel has asked you to look at Exhibit C, this necklace, style 5838, and tell us whether upon that article there is any notice of copyright.

THE WITNESS: I don't see any on this.

THE COURT: Is that a necklace of your manufacture?

THE WITNESS: It looks like it.

THE COURT: You know your own work, don't you?

THE WITNESS: I do.

THE COURT: It is one of your necklaces?

THE WITNESS: Yes.

THE COURT: Do you see any evidence of that having been removed?

THE WITNESS: It is very hard to say, your Honor. It is very easy to remove it.

[114] THE COURT: Do you see any evidence?

THE WITNESS: No, I don't see any. It could very well have been done.

Q To make sure, do you want to compare Exhibit C with Plaintiffs' Exhibit 15? A This is one of the pieces on which we stamped with the stamp and the hammer.

Q You mean one of the exhibits with the copyright notice on it? A Yes.

THE COURT: This is one of the pieces that you used the die and the hammer?

THE WITNESS: That's right.

THE COURT: Sort of punching it?

THE WITNESS: Yes.

THE COURT: May I look at the other one, please?

THE WITNESS: Yes (handing). It sometimes is more or less deep.

THE COURT: Sometimes it is more or less deep? It appears to be different, the plating on these two pieces. Did

you do your own plating?

THE WITNESS: We do. But I want to be honest with you, your Honor.

THE COURT: I want you to be honest.

[115] THE WITNESS: It is possible that sometimes our plating is not exactly the same, you know, from one time to another.

THE COURT: I understand that. But your method here of putting the notice of copyright on this article, this necklace, Plaintiffs' Exhibit 15 and Defendants' Exhibit C, was not as part of the casting.

THE WITNESS: That's right.

THE COURT: It was used -- applied with a die and a hammer.

THE WITNESS: I can explain to you what the reason for that is, your Honor, if you take in the other necklace embodying the same link, you will find that our style number and copyright notice is on the central ornament of the necklace.

MR. KNAPP: Are you referring to this?

THE WITNESS: I am referring to this, Exhibit 30. You see? Where our name is put right here. We cannot put the name here and here. We cannot put the name all over.

THE COURT: All right.

* * *

[Page 125, line 2 - Page 126, line 6]

BY MR. SPARROW:

Q Mr. Boucher, I believe you testified yesterday that Marboux Corporation is an affiliate of Boucher, of the plaintiff?

A Yes.

Q In other words, you have the same members or the same officers of the plaintiffs and the Marboux Corporation; that is, the officers are the same? A No, there are some additional members.

Q Are you an officer of Marboux Corporation? A Yes, I am.

Q And you are also the plaintiff in this action? A Yes.

MR. SPARROW: Mark this for identification.

(Marked Defendants' Exhibit F for identification.)

Q I show you Defendants' Exhibit F and ask you whether this exhibit is a pair of earrings which was manufactured by Marboux?

A That is correct.

[126]

Q I wish you would take these earrings off the card--

MR. KNAPP: Could we put that in evidence?

MR. SPARROW. I am sorry. Mark it in evidence.

(Defendants' Exhibit F for identification received in evidence.)

* * *

[Page 126, line 22 - Page 129, line 13]

THE COURT: All right. And this jewelry, Defendants' Exhibit F, was made by the corporation in which you are interested.

[127]

THE WITNESS: That's right.

THE COURT: And turned out in the same factory as you run your partnership business.

THE WITNESS: No, not exactly. This is partly jobbing.

THE COURT: Contract work?

THE WITNESS: Contract work.

THE COURT: I see. All right.

MR. KNAPP: If your Honor wishes to have the testimony of yesterday --

THE COURT: No. I will look at it afterwards.

BY MR. SPARROW:

Q Mr. Boucher, will you look at Defendants' Exhibit F and tell me whether you see any copyright notice on either of those earrings? A No.

Q Will you tell us when these earrings were manufactured? A By Marboux?

Q They were not manufactured by Marboux, I understand. A They were manufactured for Marboux.

[128] Q When were they first manufactured? A For Marboux?

Q Yes. A In the fall of 1955.

Q In the fall of 1955? A Yes.

Q Do you recall that the defendants took your deposition, the last one taken around October 24, 1955? A (No response.)

MR. SPARROW: May I offer at this time for identification the two volumes of depositions that were taken?

THE COURT: The witness' deposition?

MR. SPARROW: Yes.

THE COURT: Do you want to offer them in evidence?

MR. SPARROW: Yes, I will offer them in evidence.

THE COURT: Any objection?

MR. KNAPP: No objection.

THE COURT: Received in evidence. I will read them. You don't have to read them now. If you will give them to me

I will take them up to my chambers with me tonight and take them home and read them. [129] Mark them in evidence by consent.

(Marked Defendants' Exhibits G and H, respectively, in evidence.)

Q You were asked to bring with you, to produce, evidence or any correspondence, invoices or orders which appertained to the contracting work which Marboux had with a firm in -- of your manufacture up in the New England states. Do you recall the name?

A C. W. Randall.

Q Referring particularly to Exhibit F, did you bring those records with you? A Yes. Mr. McGovern has them.

* * *

[Page 131, line 21 - Page 135, line 10]

BY MR. SPARROW:

Q Mr. Boucher, I show you a paper and ask you to tell me what this paper represents.

THE COURT: Mark it for identification.

(Marked Defendants' Exhibit I for identification.)

MR. SPARROW: And mark this as one exhibit.

MR. KNAPP: That consists of six Marboux and one Randall invoices.

(Marked Defendants' Exhibit J for identification.)

Q I show you Defendants' Exhibit I and ask you what that paper represents. A That is an order.

Q Given by whom to whom? A By Marboux to Randall.

Q To Randall? A Yes.

Q What is the date of that order? A June 17, 1955.

Q Before you order merchandise from --

MR. KNAPP: Is that in evidence?

MR. SPARROW: I offer it in evidence.

MR. KNAPP: No objection.

(Defendants' Exhibit I for identification received in evidence.)

Q You placed the order on June 17, 1955, did you not?

[133]

A From what it says here, yes.

Q In order to place an order, you have to have something to order by or with, isn't that right? A Yes, but we can give the model.

Q Where was that model made? A That model in here?

Q The model of Exhibit F. A Oh, that model was made in the spring, 1954.

Q Be a little more specific than that. What month?

A Well, that I wouldn't recall exactly. I said in the spring, 1954.

Q What is the custom if you give an order for merchandise? How many months before that should you have the model ready in order to go through the procedure in order to OK it, and so forth? A Well, there seems to be some misunderstanding here because this particular earring -- these earrings were sold by Marcel Boucher for a year before it was sold by Marboux.

Q For one year? A For one year.

Q And then Marboux came out with the same type of earring?

[134]

A That's right. That happened to be one of the numbers that was copied, and they were not able to be Boucher any more, so we passed them on to Marboux to be sold at a reduced price.

Q Did you sell many earrings? A I wouldn't know.

Q Let us go back to the time when you made the earrings--

THE COURT: Made what earrings?

MR. SPARROW: Defendants' Exhibit F.

THE COURT: It doesn't seem to me that it is too material or relevant to this case.

MR. SPARROW: Let me explain to you why I believe it is material. First of all, this man testified in his deposition that he did not produce this until about September of 1955, after he was damaged by us, by the defendants. The defendants were served with a complaint, I think, around July 7.

Our contention is that this item came out on the market before we were ever served, and therefore it is a dedication by putting out a pair of earrings of the same ornamental [135] design as Exhibit 1, I believe, attached to the complaint without any copyright notice by a person who is both an officer and a moving spirit of the plaintiffs and Marboux Corporation.

THE COURT: Well, I think that it is claimed by the plaintiff here -- I haven't heard the proof, but, looking at the complaint and at the memorandum that has been submitted, I think it is the claim here that the copyright was infringed prior to the fall of 1955, that it was infringed in the winter.

MR. KNAPP: Spring of 1955, your Honor.

* * *

[Page 136, line 8 - Page 143, line 13]

THE COURT: When did you first market or sell this earring, Defendants' Exhibit F?

THE WITNESS: You mean by Boucher or Marboux?

THE COURT: By Marboux.

THE WITNESS: When did we first sell it? Well, if I can look in here --

MR. SPARROW: I will offer this Defendants' Exhibit J.

MR. KNAPP: No objection.

(Defendants' Exhibit J for identification received in evidence.)

THE COURT: May I see your Exhibit No. 1, please? It appears to me that this Defendants' Exhibit F is of a different design.

MR. SPARROW: It has the same general design on it, your Honor.

[137] THE COURT: No. This is what I would call a nail texture instead of a twisted rope texture.

MR. SPARROW: But he says rope texture is old.

THE COURT: Of course, all of this is old. All of this twisted rope design did not originate with Boucher, not did this hobnail effect originate with Boucher. That is as old as the hills, we might say. I guess it is as old as art is. You see it in ancient jewelry produced in ancient Egyptian jewelry.

MR. SPARROW: But he has the same design, exactly the same design, on that exhibit as he has in Exhibit 1.

THE COURT: That is the reason why I would like to see it.

MR. SPARROW: Only it is a rope texture which is old.

THE COURT: It is a combination of these things.

MR. SPARROW: But he, himself, said he put it out in order to meet the competition, by his own testimony.

Where is that exhibit? Where is Exhibit 1?

[138]

THE COURT: Exhibit 1 is the licensing agreement.

MR. KNAPP: I think Mr. Sparrow means Exhibit 1 annexed to the complaint.

THE COURT: That is Exhibit 6 in evidence.

MR. SPARROW: Yes.

THE COURT: That is style 5807.

I now hold in my hand for the purpose of visual comparison Plaintiffs' Exhibit 6 and Defendants' Exhibit F. I find no similarity in design or art representation.

BY MR. SPARROW:

Q Mr. Boucher, I show you Exhibits 4, 8, 12 and 16 and ask you to look at the back of each and read the line under No. 10.

A "Wording of copyright notice appearing on work," then "C" in a circle, "Boucher."

Q Will you look in the front and tell me when the date of first publication appeared on the certificate? It says "June 14, 1954," does it not? A That's right.

Q Were you doing business under the trade name of Boucher in June, 1954? A Yes, we were.

[139]

Q Just take your time in recollecting whether you did or not. A Yes, we were.

THE COURT: Exhibit 1, which is in evidence, is dated, according to my notes, February 17, 1954. That is the licensing agreement, is it not?

MR. SPARROW: The licensing agreement has nothing to do with this, sir, with respect to the subject matter that I am going to refer to now, see?

THE COURT: All right. I won't interfere with you.

MR. SPARROW: That is all right. I apologize if I in any way --

THE COURT: No. You are perfectly right. There is no reason why you should disclose your purpose.

Q Can you try to recoliect as clearly as you can or as closely as you can when you first started to do business under the trade name of Boucher? A Well, as a matter of fact, for many, many years -- I mean, when it comes to advertising and publicity, many people are not mentioning their first name. They are mentioning Boucher.

Q I ask you again, when did you first start to use the trade name Boucher? A Well, I want to ask the advice of my [140]
lawyer.

THE COURT: No. That you are not entitled to ask on. If you don't know, say so.

THE WITNESS: I don't know, that's all.

THE COURT: You don't recall.

THE WITNESS: I don't recall.

THE COURT: Are there any papers that you might look at that would refresh your recollection?

THE WITNESS: Well, if I do recall, I mean the trade name Boucher was --

THE COURT: Registered?

THE WITNESS: --registered at one time or another.

THE COURT: Do you remember when it was?

THE WITNESS: I don't remember.

THE COURT: And by "registered" you mean filed with

the County Clerk's office?

THE WITNESS: What I do recall very well is that it was agreed with the Copyright Office that the name Boucher for copyright notice would be agreeable.

Q When was that? A That goes back in May, 1954.

[141]

Q May, 1954? A That's right, when I was down in Washington.

MR. SPARROW: I offer in evidence a certified copy of the certificate of conducting business of Marcel Boucher as Boucher.

MR. KNAPP: No objection.

(Marked Defendants' Exhibit K in evidence.)

MR.SPARROW: Will you let me have the sealed envelope, please, with the three exhibits in there?

MR. McGOVERN: Yes.

Q Mr. Boucher, you testified in your deposition that you first went to the Copyright Office with some pieces with your Phrygian bonnet trade-mark and initial M.B., and they refused to register or copyright those pieces because of the fact that you did not have your name on there. Can you tell us just about when that occurred? A That was also approximately that time. I don't know whether it was the first time, or I don't know whether it was in May. I think it was in May also. It may have been in June. I don't recall.

Q And you recall also having testified that you had made some deliveries of the products, of the articles in issue here, with

[142]

the Phrygian trade-mark and your initials M.B.? A I don't recall that.

MR. KNAPP: I must insist that the deposition speak for itself if Mr. Sparrow is going to advert to it.

THE COURT: Overruled.

THE WITNESS: I didn't say that we did deliver pieces with that trade-mark, but I said that we started to manufacture certain pieces thinking that will be agreeable to the Copyright Office.

Q Tell us the story of what happened when you went down there to the Copyright Office with the Phrygian trade-mark on your goods. A I was not given the answer right away, only after Mr. Dalsimer did tell us that the trade name was not acceptable and that the trade-mark was not acceptable with the "C" in the circle and that we have to use the name.

Q I see. A The name Boucher.

THE COURT: Mr. Sparrow, I don't know just what significance you want me to attach to the fact that this certificate, Defendants' Exhibit K, which is required by the State Penal Law, was not filed [143] in the County Clerk's office in New York County until August 10, 1954. If you want me to hold, if you feel that I should hold, that the copyright registration is at all limited by the State requirement, State penal requirement, that a certificate of trade-name be filed, I am not going to do so because I feel, the certificate of registration having been issued for use under a trade name, that compliance with the terms of the certificate of registration meets compliance with the statutory requirements, irrespective of any State regulation which might require the filing of a certificate such as Defendants' Exhibit K.

* * *

[Page 157, lines 1 - 4]

J U L E S S T E I N B E R G , called as a witness on behalf of the plaintiff, having been first duly sworn, testified as follows:

DIRECT EXAMINATION BY MR. KNAPP:

* * *

[Page 167, line 19 - Page 187, line 11]

Q I show you Plaintiffs' Exhibit 45 for identification and ask you if that piece is of your manufacture.

MR. SPARROW: Your Honor--

THE COURT: Do you concede that it is?

THE WITNESS: Yes, sir.

[168] THE COURT: All right. Received in evidence. This is Exhibit 45.

(Plaintiffs' Exhibit 45 for identification received in evidence.)

THE COURT: What piece do you relate that to?

MR. KNAPP: That is related, your Honor, to Exhibit 20, which is style No. 5928.

THE COURT: All right.

Q Mr. Steinberg, was the piece from which you made Plaintiffs' Exhibit 54 a Boucher piece? A We took that piece that you just mentioned and blocked up the stones on the item with stones and made it into a tailored item. All we had was the rhinestones and we made it into a tailored item.

Q Do you mean to tell me, Mr. Steinberg, that you purchased the rhinestone version of Plaintiffs' Exhibit 44?

A I did not say that. We made this item first. Then we made it into a tailored item to represent the piece you just showed me.

Q Yes, but from which Boucher piece did you get your idea? A The one with the pearls.

[169] Q The one with the pearls? A That is what I told you before.

MR. KNAPP: Mark these for identification.

(Marked Plaintiffs' Exhibits 46 and 47 for identification.)

Q I show you plaintiffs' Exhibits 46 and 47 for identification, Mr. Steinberg, and ask you if those pieces are of your manufacture. A Yes.

MR. KNAPP: I will introduce them into evidence as Plaintiffs' Exhibits 46 and 47.

(Plaintiffs' Exhibits 46 and 47 for identification received in evidence.)

THE COURT: 46 relates to what?

MR. KNAPP: Relates to Exhibit 17, which is style No. 5917. Exhibit 47 relates to Exhibit 18, which is style No. 5918.

Q Mr. Steinberg, may I ask you if Plaintiffs' Exhibits 46 -- if the models for Plaintiffs' Exhibits 46 and 47 were obtained by you by the purchase of a Boucher piece in a retail store? A May I have that again, please?

Q Were the models for Exhibits 46 and 47 obtained by you by the purchase of a Boucher piece in a retail store? [170] A I could answer you better if I see the pieces in front of me, sir.

Q I will be glad to show them to you (handing).

MR. SPARROW: I object to that question. A proper

question to ask would be whether he did buy them.

THE COURT: He can say if he knows or not. You don't dispute it, do you?

MR. SPARROW: I do dispute that he bought any Boucher pieces, your Honor.

THE COURT: You don't dispute that he used the Boucher models as the basis for the production of these items, do you?

MR. SPARROW: Not as the basis. It depends on the construction of the word "basis." In other words, they did not take it and put it in a mold and make a copy of it. They worked around it to make their own design and their own interpretation of it. That we will admit.

MR. KNAPP: I think we will accept Mr. Sparrow's contention.

THE COURT: Read the question.

(Question read)

[171] A 47, which is rhinestones, was the only one which I believe was purchased.

Q It is your testimony that Exhibit 47, a Boucher piece with rhinestones, was purchased by your firm in a retail store? A I believe so.

Q You are certain it wasn't 46, which is the tailored version? A I am certain.

Q Was that true of all the pieces in the suit, Boucher pieces in the suit, that the rhinestone versions were purchased in the stores? A The rhinestones were purchased.

Q You are quite sure of that? A I am almost positive.

(Plaintiffs' Exhibits 48 and 49 marked for identification.)

Q Mr. Steinberg, I show you Plaintiffs' Exhibits 48 and 49 for identification and ask you if those are of the manufacture of B. Steinberg-Kaslo Company? A Yes.

Q Were the models for these pieces obtained by purchases in retail stores?

MR. SPARROW: By whom?

[172] MR. KNAPP: By the defendant.

MR. SPARROW: Which defendants? There are defendants. There are seven defendants.

THE COURT: He means Steinberg-Kaslo Company.

A 49, with the rhinestones, I believe was the one that was purchased.

Q It is your testimony that the rhinestone version of Plaintiffs' Exhibit 49 was purchased in a retail store, is that correct? A Yes.

Q Are you quite certain Plaintiffs' Exhibit 49, the plain piece, was not purchased in a retail store? A I am quite certain.

Q You are quite certain of that?

What is the source of your information? A As production man that was the only thing I saw for a while, working in the place.

Q You were able to determine that the rhinestone versions were purchased in the stores? A That is the first thing we worked on.

Q You looked at them when the pieces came in?

A After they started coming in through the factory, from the model room.

[173] Q How did you know that the pieces bought in the store had rhinestones? A That is the only thing -- that is the only ones we used, with the rhinestones, at the beginning until we were asked to make it into a tailored item.

Q But how did you know that the pieces bought in the store were the rhinestone? You did not answer my question.

A Because I saw them in the place.

Q You saw the pieces with the rhinestones, you mean the Boucher pieces? A My pieces in the place.

Q But how do you know that the pieces that were bought in the store by your partner, as you testified, had rhinestones in it?

A Because they came out of the dies with rhinestones. They must have had rhinestones in them.

Q Then you assume that your partner bought the rhinestone pieces, is that correct? A I am almost positive.

Q Unless you were there, how would you know?

A I assume.

[174] THE COURT: Don't argue with the witness, counsel. Please don't argue with the witness.

What piece do you relate 48 to?

MR. KNAPP: 48 relates to Exhibit 2, style No. 5877.

THE COURT: And 49?

MR. KNAPP: And 49 relates to Exhibit 3, which is style No. 5878.

THE COURT: These pieces that you are introducing in evidence, 44, 45, 46, 47, 48 and 49, you allege constitute the infringement?

MR. KNAPP: That is correct, your Honor.

THE COURT: All right.

MR.KNAPP: Mark these 50 and 51 for identification.

(Marked Plaintiffs' Exhibits 50 and 51 for identification.)

Q I show you Plaintiffs' Exhibits 50 and 51, Mr. Steinberg, and ask you if these are of Steinberg-Kaslo's manufacture?

A Yes.

MR.KNAPP: I introduce these into evidence as Plaintiffs' Exhibits 50 and 51.

[175] (Plaintiffs' Exhibits 50 and 51 for identification received in evidence.)

Q Mr. Steinberg--

THE COURT: Wait. 50 relates to what exhibit? I would like to get this down.

MR. KNAPP: Exhibit 50 relates to Exhibit 6, style No. 5807; 51 relates to Exhibit 7, style No. 5836.

(Marked Plaintiffs' Exhibits 52 and 53 for identification.)

Q Mr. Steinberg, were the models used by your company to make Plaintiffs' Exhibits 50 and 51 purchased in retail stores?

A I can answer you better if I have the pieces, if you don't mind.

Q (Handing to witness). A 51 was purchased.

Q You are certain that 51, which is the version with rhinestones, was purchased in a retail store? Is that correct?

A That's right.

Q Mr. Steinberg, I show you Plaintiffs' Exhibits 52 and 53 for identification and ask you if these pieces are of the defendants' manufacture. [176] A Yes.

MR.KNAPP: I will introduce them into evidence as Plaintiffs' Exhibits 52 and 53.

(Plaintiffs' Exhibits 52 and 53 for identification received in evidence.)

MR. KNAPP: They relate to Exhibits 14--

THE COURT: 52 relates to 14.

MR. KNAPP: Correct, your Honor, and 53 relates to Exhibit 15, style No. 5838.

Mark this for identification.

(Marked Plaintiffs' Exhibit 54 for identification.)

THE COURT: Your hinges on these bracelets are cast and then bent over, are they? That is cast right in, they are not soldered?

THE WITNESS: No, sir, cast.

Q Mr. Steinberg, looking at Plaintiffs' Exhibits 52 and 53, would you tell me which one was purchased by the defendant in a retail store? A 53.

Q Exhibit No. 53 was purchased? A That's right.

Q The one with the rhinestones? A That's right.

[177] Q Who did the purchasing? A It is hard to say.

THE COURT: He did not do it.

THE WITNESS: I did not do it.

Q I am asking who did it.

THE COURT: If you know. Do you know who did it?

THE WITNESS: I don't know. It is either one of my partners, sir.

Q Was it Mr. Hyman Slovitt? A That you will have to find out from him. I am not sure.

Q Was it Mr. Abraham Slovitt? A I can't tell you that. I would be telling you a lie. I don't know.

Q I show you plaintiffs' Exhibit 54 for identification and ask you if that is of the defendants' manufacture. A Yes, sir.

MR. KNAPP: I will introduce that into evidence as Plaintiffs' Exhibit 54.

(Plaintiffs' Exhibit 54 for identification received in evidence.)

MR.KNAPP: That relates to Exhibit 9 annexed to the complaint.

[178] THE COURT: No. What exhibit in evidence?

MR. KNAPP: I am sorry. That relates to Exhibit 9 in evidence, which is style No. 5816. I beg your pardon, your Honor, that relates to Exhibit 11, which is style No. 5859.

(Marked Plaintiffs' Exhibits 55 through 58 for identification.)

Q I show you Plaintiffs' Exhibits 55, 56, 57 and 58 for identification and ask you whether those pieces are of your manufacture. A Yes.

Q All of them? A I believe so, yes.

MR. KNAPP: I will introduce 55, 56, 57 and 58 for identification in evidence.

THE COURT: Received in evidence.

(Plaintiffs' Exhibits 55, 56, 57 and 58 for identification received in evidence.)

MR. KNAPP: Exhibit 55 relates to Exhibit 26, style No. 5971. Exhibit 56 relates to Plaintiffs' Exhibit 25. Exhibit 57 relates to Plaintiffs' Exhibit 29, style 5983; Exhibit 58 relates to Plaintiffs' Exhibit 28, style No. 5984.

Mark these for identification.

[179] (Marked Plaintiffs' Exhibits 59, 60 and 61 for identification.)

Q With reference to Exhibits 57 and 58, were the models for your pieces purchased in retail stores? A Yes.

Q For both 57 and 58? A No, just 57 only. I am sorry, I am sleeping.

Q In other words, you purchased 57? A I believe that was purchased.

Q And you did not purchase 58? A Yes.

Q You are quite certain of this? A Yes.

Q In connection with Exhibits 55 and 56 in evidence, is it your testimony that Exhibit 55, the rhinestone version, was purchased in a retail store? A It was.

Q You don't know which store? A No.

Q And you don't know which partner bought it?

A No, sir.

Q And you don't know when they were purchased, do you?

A Let me see now. Not exactly.

[180] Q Well, roughly. A Around April.

Q Of 1955? A I believe so.

Q But your memory is quite clear that the rhinestone versions were purchased, is that correct? A I believe so, yes.

Q Mr. Steinberg, I show you Plaintiffs' Exhibits 60 and 61 for identification--

THE COURT: Wait. You did not relate these-- all right. Go ahead.

Q --and I ask you if those pieces are of your manufacture.

A I believe so.

Q I want to be certain about this, Mr. Steinberg.

THE COURT: There is no doubt about that, is there, Mr. Sparrow? that these pieces are --

THE WITNESS: Yes, I think so.

Q I don't think you should think so. You should know so, Mr. Steinberg. A Yes.

MR. SPARROW: If you believe that it was made, you may say so.

MR. KNAPP: I will introduce these into evidence as [181] Plaintiffs' Exhibits 60 and 61.

(Plaintiffs' Exhibits 60 and 61 for identification received in evidence.)

Q I show you Exhibit 59 for identification and ask you if that is of your manufacture. A Yes.

MR. KNAPP: I offer it in evidence.

(Plaintiffs' Exhibit 59 for identification received in evidence.)

MR. KNAPP: Judge, we are claiming that Exhibit 59 -- that is an infringement -- 60 relates to --

THE COURT: Let's not jump away from 59. What do you relate 59 to?

MR. KNAPP: 59 relates to Exhibit 31.

THE COURT: And style 5913.

MR. KNAPP: Exhibit 60 relates to Exhibit 31, which is style No. Necklace 5913. No. 61, Judge, we are claiming relates to two items, Plaintiffs' Exhibit 20, as well as Plaintiffs' Exhibit 31.

THE COURT: 61 is a bracelet.

MR. KNAPP: That is correct.

[182]

THE COURT: I observe that none of the pieces introduced as being of the plaintiffs' manufacture were bracelets.

MR. KNAPP: That is correct. They were all necklaces.

THE COURT: They were necklaces, pins and earrings.

Q Mr. Steinberg, I show you Plaintiffs' Exhibits 62 and 63 marked for identification and ask you if those pieces are of your manufacture. A Yes.

Q Yes is your answer? A Yes.

MR. KNAPP: I will introduce them as Plaintiffs' Exhibits 62 and 63 in evidence.

(Plaintiffs' Exhibits 62 and 63 for identification received in evidence.)

THE COURT: 62 relates to what exhibit?

MR. KNAPP: 62 relates to Plaintiffs' Exhibit 36, and 63 relates to Plaintiffs' Exhibit 37, style No. 5922.

Q Mr. Steinberg, I show you Plaintiffs' Exhibits 64 and 65 for identification and ask you if those are of your manufacture.

A Yes.

[183] MR. KNAPP: I will introduce them into evidence as Plaintiffs' Exhibits 64 and 65.

(Plaintiffs' Exhibits 64 and 65 for identification received in evidence.)

MR. KNAPP: These pieces relate to Exhibit 23.

THE COURT: 64 relates to Exhibit 23?

MR. KNAPP: They both relate to Exhibit 23. Both of them.

THE COURT: Both of them?

MR. KNAPP: That is correct.

Q Mr. Steinberg, I show you Plaintiffs' Exhibits 64 and 65 and wish to ask you where the models from which they were made were purchased. A I believe they were purchased in a store uptown, one of the department stores.

Q By whom? A (No response).

Q You don't know? A I don't know. Either Al or Hy.

Q You don't know which store? A I don't know which store.

Q Was it 65 which was purchased? A 65.

[184] Q It was definitely 65, is that correct? A That's right.

Q With the rhinestones? A With the rhinestones.

Q Mr. Steinberg, do you recall the pretrial depositions taken herein? Do you recall Exhibit 64 was placed into evidence as Plaintiffs' Exhibit 6-K at the examination before trial? Do you recall this testimony-- A That was taken a year and a half ago?

Q That's right. "We left off on Plaintiffs' Exhibit 6-K for identification which you testified was a copy, and correct me if I am wrong, from a piece similar to Exhibit 5-D for identification."

You will recall that at the examination this piece, which is Plaintiffs' Exhibit 23 at the trial, was marked as Exhibit 5-D for identification.

"Q Would you tell us in your own words precisely how you manufactured Exhibit 6-K" -- referring to Exhibit 64, this one.

"A A piece was bought by my partner.

"Q Was that in a store?

"A In a store. I can't tell you what store. It is

[185]

numerous stores and we put it into rubber and then we start working on it, change it around a bit. I believe the one we had was with stones in it, had rhinestones in it.

"Q When you say 'the one you had had rhinestones,' do you mean the piece that you bought in the store?

"A Had rhinestones.

"Q Was it not like Exhibit 5-D?

"A I am not sure, but I believe it was with rhinestones if I recollect right now.

"Q Do you mean it was like Exhibit 5-D?

"A It was like 5-D, but had rhinestones along the edge here."

Mr. Steinberg, have you been in court over the course of the testimony of Mr. Boucher for the last two days? A I have.

Q Did you hear Mr. Boucher's testimony that the firm of Marcel Boucher et Cie did not make a piece like plaintiffs' Exhibit 23 with rhinestones? A Must have passed me by.

Q You have a piece in your possession that looks like Exhibit 23 with rhinestones? A Right here.

[186]

Q Yes. A I have a piece here with rhinestones.

Q Have you ever seen a Boucher piece with rhinestones?

THE COURT: You mean a Boucher piece of this item?

MR. KNAPP: That is correct, with rhinestones, of Exhibit 23.

THE COURT: If you recall.

THE WITNESS: I don't recall.

Q But you were quite certain in your testimony, were you not, that your partner bought a version of Exhibit 23 with

rhinestones?

THE COURT: That is his best recollection. That doesn't impress me.

A That was my best recollection.

Q In other words, you are not sure? A No.

Q So that in connection with any one of these pieces your partners might have bought either the tailored version or the rhinestone version? A To my mind they must have bought the rhinestones, but I don't know how the rhinestones came in there.

Q You say they must have bought the rhinestones.

[187]

A I believe so.

Q But they might have bought the tailored?

THE COURT: Is that a question or a statement?

MR. KNAPP: I am asking him.

THE COURT: Are you positive that it was a rhinestone piece that your partners bought?

THE WITNESS: I am not sure.

THE COURT: Or might it have been a tailored piece?

THE WITNESS: I am not sure.

THE COURT: He is not sure.

* * *

[Page 188, line 12 - Page 196, line 2]

THE COURT: You may correct any testimony you gave yesterday.

THE WITNESS: I would like to correct some testimony because I was a bit confused.

THE COURT: All right. What do you want to correct?

THE WITNESS: On the first item that was brought to my

attention -- you mentioned a pearl.

DIRECT EXAMINATION CONTINUED BY MR. KNAPP:

Q Do you want to change your testimony now?

THE COURT: Wait, counsel. He is making a statement. What testimony do you want to change?

[189]

THE WITNESS: I would like to have the counsel show me that first piece.

THE COURT: Which first piece?

THE WITNESS: The first piece that he showed me yesterday with the pearls, when he mentioned pearls with it.

THE COURT: That is the pearl pin.

THE WITNESS: That's right.

MR. KNAPP: I will be happy to.

THE COURT: That is Exhibit 44, Plaintiffs' Exhibit 20, style No. 5928.

THE WITNESS: I believe that we bought the rhinestone piece; I am sure of it, and not the pearl.

Q By that statement, Mr. Steinberg, do you mean that when your partner bought the model from which you made Plaintiffs' Exhibits 44 and 45 in evidence, that you bought the Boucher piece with the rhinestones, being Exhibit 21? A I bought 21.

Q Is that correct? A That's correct.

Q You are certain of that now? A Yes, and also--

Q Did you change your testimony after consulting one of your partners?

[190]

A Yes. I was enlightened.

Q Whom did you discuss it with? A Hy.

Q I beg your pardon? A Herman Slovitt. And also the last item that you showed me yesterday, I would like to rectify

my testimony.

THE COURT: Exhibit 65. That is a pin, 5929, Exhibit 23.

Q (Indicating). A I believe we bought the tailored item, whereas yesterday I said we bought the rhinestone item. We bought item 23, and we changed it and put rhinestones into it.

Q The piece that your partner bought in the store was similar to Plaintiffs' Exhibit 23, which is a tailored pin? A Yes.

Q Is that statement made in view of the fact that you now realize Mr. Boucher did not make a rhinestone version?

A That, and I was confused.

Q Mr. Steinberg, do you have any other corrections of your testimony from yesterday? [191] A (No response).

Q Would you like to confer with Mr. Slovitt? I would be willing to attend on you while you did.

THE COURT: Don't do that.

A I would like to bring out to the Judge, when he asked me about this yesterday, seeing that this is my first time in court and I was a bit confused, that I do run into the model room every once in a while.

Q I did not hear that. A I do run into the model room every once in a while. That is a natural reaction and our merchandise is very cheap merchandise. It is $1 merchandise and $2 merchandise and we have to try to get them out fast, the quickest way possible. We don't have any filers. When we have any flushers, we throw it into the tumble and it picks up all the dirt. The spray-plate covers a lot of flaws in the item, a lot of markings, and therefore we do save money by doing it that way.

Q During the course of manufacture do you break up the pieces that were brought in the stores? A We break up the pieces.

[192]

Q Do you have any of the pieces in court today? I am referring to the Boucher pieces that were bought in the store. Do you have the remnants of any you used as your working models?

A I don't believe so.

Q Mr. Steinberg, do you recall your pretrial testimony when this piece was introduced in your deposition as Plaintiffs' Exhibit 4 for identification which is the rhinestone - Plaintiffs' Exhibit 44 in evidence at the trial, which is the same as -- which corresponds to Plaintiffs' Exhibit 21, the Boucher pin with the rhinestones? You recall bringing that to the deposition, don't you, Mr. Steinberg?

A I don't remember.

Q Suppose I read from your deposition, page 12:

"Q I have asked you pursuant to subpoena to bring with you tangible samples of jewelry manufactured by your concern. Of course, I have particular reference to those which are copies, or, as Mr. Sparrow might say, similar to those which are shown as exhibits annexed to the complaint.

"Do you have anything that looks like Exhibit 3?

[193]

"(Witness handing Mr. Knapp a piece of costume jewelry.)

"Mr. Knapp: I would like to put this piece in as Plaintiffs' Exhibit 4 for identification."

MR. KNAPP: Your Honor, that is Plaintiffs' Exhibit 44 in the trial, the rhinestone version of that pin.

(Continuing)

"Q I think we would be interested if you told us, Mr.

Steinberg, how you produced Exhibit 4 for identification, which you have just produced.

"A How we made that?

"Q Yes, in your own words.

"A A piece was brought to my attention. My partner bought the piece. I believe this piece had pearls in it, and we put that piece into the mold, and after it came out of the die our model makers went ahead and changed it and made our model of it."

THE COURT: Did you make those answers to those questions?

THE WITNESS: I believe I did if he has it in the book, sir.

Q Later on in your deposition -- I may call your attention, Mr. Steinberg, on page 16 you were asked:

[194] "Q Now, you testified that you took the pearls out of this piece, Exhibit 5-A for identification, and put it in a rubber mold similar to Plaintiffs' Exhibit 1, is that correct?

"A I am not sure now. I believe that I bought-- that we had the one with the rhinestones and the one with the rhinestones we had, and that's the one I used. I am positive now."

Was that your answer?

A Is that the deposition that I gave you?

Q Yes. A Was that recently or a year and a half ago?

Q That was a year and a half ago. A I believe it is.

Q Mr. Steinberg, at the pretrial deposition you told us that the piece that your partner bought had pearls, at first. You changed

your testimony and told us that the piece had rhinestones. At the trial yesterday you said the piece that your partner bought had pearls. Today you have changed it so as to indicate you bought the piece with rhinestones. Which version do you now want the Court to believe? A I believe it is the rhinestones.

[195]

Q All right. Mr. Steinberg, I show you Plaintiffs' Exhibits 66 and 67 and ask you if those pieces are of your manufacture.

A Yes.

MR. KNAPP: I would like to introduce these into evidence as Plaintiffs' Exhibits 66 and 67.

(Plaintiffs' Exhibit 66 and 67 for identification received in evidence.)

THE COURT: What does 66 relate to?

MR. KNAPP: 66 relates to Exhibit 33, style No. 5949. Exhibit 67 relates to Exhibit No. 34, style No. 5821.

Q Mr. Steinberg, I would like to ask you whether Exhibits 66 and 67 were made from pieces bought by your partner, from Boucher pieces bought by your partner in retail stores.

A I believe 67 was made.

Q By that do you mean that your partner purchased a piece similar to Plaintiffs' Exhibit 34 (indicating)? A That's right.

Q Which is the Boucher piece with the rhinestones, is that correct? A Similar to 34.

Q In other words, you made your pieces from the Boucher

[196]

piece with the rhinestones, Plaintiffs' Exhibit 34? A That's right.

* * *

[Page 254, lines 4 and 5]

M A R C E L B O U C H E R , recalled.

CROSS-EXAMINATION CONTINUED BY MR. SPARROW:

* * *

[Page 257, line 10 - Page 258, line 24]

Q Mr. Boucher, I show you Defendants' Exhibit F. Will you mark this for identification, please?

(Marked Defendants' Exhibit Q for identification.)

MR. SPARROW: I will go on record and state that the exhibit is a piece of costume jewelry of defendant's manufacture.

MR. KNAPP: I have no objection.

MR. SPARROW: I offer Exhibit Q as an exhibit in this case.

(Defendants' Exhibit Q for identification received in evidence.)

MR. KNAPP: May the record show that it is one pair of earrings?

MR. SPARROW: Yes, one of a pair.

[258] Q Mr. Boucher, I show you Defendants' Exhibit Q and ask you to compare the same with the Marboux earrings, Defendants' Exhibit F, and tell us, if you can, whether in your opinion they are similar with respect to design. I am not worrying about the clip. The clip has nothing to do with it.

MR. KNAPP: If your Honor please, I would like to object because your Honor expressly considered this identical question yesterday. I have no objection if Mr. Sparrow wants to go on, but--

THE COURT: If you have no objection, then don't talk.

MR. KNAPP: Your Honor did consider it.

THE COURT: I considered it, but go ahead.

A Well, there is some similarity in the two of them. As I told you, the copyright has been rejected.

Q Never mind about that. I am not referring to copyright. They are similar in design, are they not? A Yes.

Q They are. A You mean basically?

Q Yes, the basic design. A Yes.

* * *

[Page 259, line 21 - Page 264, line 19]

I R V I N G K A N D E L L , called as a witness on behalf of the defendants, having been first duly sworn, testified as follows:

[260]

DIRECT EXAMINATION BY MR. SPARROW:

Q Will you state your business, please? A Costume jewelry business.

Q How long have you been in the costume jewelry business? A Thirty-eight years.

Q Will you tell us the nature of your connection with the costume jewelry business? A We manufacture and job costume jewelry for the garment trades.

Q Do you specialize in selling to the garment trade? A That is correct.

Q Are you familiar with earrings? A Yes, sir.

Q And clips? A Yes, I am.

Q Will you give us your opinion with respect to whether or not an earring can be applied as a clip to a dress? A Most

emphatically, yes.

Q Have you got any evidence of that fact? A Yes, I have.

[261] Q Will you produce it, please? A If I may present to the Court, I have three specimens here of earrings.

THE COURT: Just mark them for identification.

MR. SPARROW: I will mark them for identification.

Will you mark these, and also mark one card?

(Card marked Defendants' Exhibit R for identification.)

(Three samples marked, respectively, Defendants' Exhibits S, T, and U for identification.)

MR. KNAPP: Has the witness testified they are of his manufacture?

MR. SPARROW: Just wait. I am getting to that now.

Q Will you tell the Court, referring to Exhibits S, T and U, who manufactured these ornaments? A Two of these items, U and T, were manufactured by Steinberg-Kaslo, and S, I believe -- is that correct?

Q Yes. A --was manufactured by Dickson Manufacturing Company of Providence, Rhode Island.

Q And Steinberg-Kaslo is one of the defendants in this suit?

[262]
A Yes.

MR. SPARROW: I offer the three cards as Defendants' Exhibit S, T and U, and the little folder that goes with it, R, in evidence.

MR. KNAPP: No objection.

(Defendants' Exhibits R, S, T and U for identification received in evidence.)

MR. SPARROW: I call the Court's attention specifically to the card, the little folder there, which indicates that the ornaments can be used for earrings or for clips.

Q Now, Mr. Kandell, referring to the Exhibits S, T and U, where do you sell these exhibits, that is, the costume jewelry pieces that are represented by these exhibits? Where do you sell them? A To the garment manufacturers from New York as far west as San Francisco and as far south as Houston.

Q If you know, tell us what the manufacturers do with those. A Decorate garments or use them for decorative ornaments on clothes or garments.

[263]

Q They use them for either? A Yes.

Q Can those ornaments also be used for earrings? A Definitely. It so specifies in my little card that goes along with it.

Q Would you say as a general proposition that earrings may be used and are used for clips or ornaments on dresses and hats, etc.? A Yes, counsel. I would like to qualify that. I have a patent issued to me--

Q Is that a patent or a trademark? A That's correct, in September, 1949, which definitely specified these changettes. To use the specific language--

MR. KNAPP: I object, unless the patent is in evidence.

MR. SPARROW: I offer it for identification, and I offer it in evidence.

THE COURT: Any objection?

MR. KNAPP: I would like to see it.

(Marked Defendants' Exhibit V for identification.)

MR. KNAPP: Judge, this is a trademark.

MR. SPARROW: I said it was a trademark.

THE COURT: You referred to it as a patent.

[264] MR. KNAPP: That is what I understood.

MR. SPARROW: I corrected him. I said it is a trademark registration. It indicates the use to which the ornaments are put.

MR. KNAPP: I object to that as showing in any respect what use the ornaments are put to.

MR. SPARROW: That is in issue here.

THE COURT: You can undertake it, but that is covered by the little pamphlet that you have in evidence, the folder.

MR. SPARROW: It is just a little stronger evidence of that fact, your Honor.

Q Would you say that the uses to which the ~~or~~naments can be put are interchangeable? A Definitely.

Q Mr. Kandell, you said that you were in the costume jewelry business for about approximately 38 years. A That's right.

* * *

[Page 265, line 21 - Page 270, line 13]

CROSS-EXAMINATION BY MR. KNAPP:

Q Mr. Kandell, have you ever seen a woman wearing your exhibits as earrings? [266] A Yes, sir.

Q What do they do with the third one? A Sometimes put it on their garment.

Q What do these sell for? A It depends. Each one is different.

Q Exhibit T. A This one sold for, I think, $4.50 a dozen singly.

Q I don't know what you mean by "singly." A As an individual unit.

Q By that you mean a unit of three? A No, a single unit, counsel. Single. It means one.

Q In other words, one of these clips-- A Sells for 37-1/2 cents each or $4.50 a dozen.

THE COURT: When did it bring that price, what year?

THE WITNESS: We are still selling these items.

THE COURT: To dress manufacturers?

THE WITNESS: Oh, yes, sir.

THE COURT: At that price?

THE WITNESS: Yes, sir.

[267] Q Mr. Kandell, I want you to look at Plaintiffs' Exhibit 17 in evidence, and I want you to hold that earring, and I want you to tell me whether in your opinion the pressure on the clip of Plaintiffs' Exhibit 17 is the same, greater or less, than the pressure on the clip in Defendants' Exhibit T.

THE COURT: Counsel, Mr. Boucher testified the pressure on that clip can be adjusted by mechanical manipulation. I think Boucher testified to that.

A I would say that there is a variation of tension with regard to both clips in my hand.

Q Which has the strongest pressure? A I believe it is Exhibit G.

Q Exhibit T, you mean -- yours? A Yes.

Q --has a greater pressure? A Yes.

Q And as a result of that would you not say, Mr. Kandell,

that perhaps the use to which your exhibit could be put might be a different one than the use to which Exhibit 17 could be put?

A Definitely and emphatically no.

[268]

Q Wouldn't you need stronger pressure for a dress to hold a piece like your Exhibit than you would on an ear? A Definitely not.

Q Let's just put a piece of your Exhibit T in your lapel. Do you mind? A No, certainly not.

Q You don't mind? A Certainly not.

Q All right. Pull it off. A (Pulling).

Q It comes off quite easily. Would you agree with me?

A (No response).

Q It came off quite easily? A You said that, counsel. I didn't say that.

Q I am asking you if it came off quite easily. A As compared to what?

THE COURT: Objection sustained.

A It came off - period.

THE COURT: It is a matter of judgment. I observed he had to use some pressure on it.

Mr. Kandell--

THE WITNESS: Yes, sir.

[269]

THE COURT: Your pieces, are any of them molded pieces, or are they all stamped?

THE WITNESS: No, sir, some are molded or cast, and some are stamped. We have a very large and varied line of this, your Honor.

--If I may qualify this particular item, it doesn't necessarily have to be used, as counsel just indicated, as a clip. I have

hundreds of advertised garments where this was used as a functional closing to a garment, where two specific buttonholes, half inch wide, were made this way (indicating), horizontally on a garment, instead of a stud, were put through and through the garment, and became a functioning closing.

As I say, I have hundreds of thousands of dollars worth of advertising on it.

THE COURT: Would the functioning of these changettes--

THE WITNESS: Yes, sir.

THE COURT: --both as closing apparatus or as a button and as earrings, be affected by the weight of the ornament itself?

THE WITNESS: No, sir; no, sir.

Q You mean, Mr. Kandell, that if you had a clip that was, say, twice the weight of the clip shown on Exhibit U, it would not fall off the lapel easier than this lighter piece on Exhibit U? A It all depends on how it was used on a garment, counsel.

[270]

Q Assume it had the same pressure and it was in the same place, would not the heavier one have the tendency to come off easier? A Again I repeat, you would have to show me where on a garment it would be used, counsel.

Q Let's say your lapel, Mr. Kandell. A But this is not -- the ladies don't have lapels.

Q The ladies wear it on a suit? A Let me qualify it, counsel.

* * *

[Page 270, line 19 - Page 271, line 7]

A If it were to be used here where it belonged, counsel, the weight itself would have no bearing on the ear clip or what we call

changette, which is practically the same thing.

Q Do you mean that it could only be used in certain parts of the garment? [271] A That's correct.

Q And by that do you mean a place where there is a horizontal line to the garment? Is that what you meant? A Not necessarily, no.

Q Or someplace in a garment where it would remain?

A That is correct.

* * *

[Page 273, lines 2 - 4]

M A R C E L B O U C H E R , recalled on behalf of plaintiffs on rebuttal, having been previously sworn, testified as follows:

* * *

[Page 276, line 2]

CROSS EXAMINATION BY MR. SPARROW:

* * *

[Page 277, line 10 - Page 281, line 21]

Q You heard the previous witness testify that he sold hundreds of thousands of dollars worth of the costume jewelry pieces on Defendants' Exhibits S, T and U, did you not? A Yes.

Q Would you say that was a misstatement? A Well, I would certainly say, that is, none of them to me looks like a dress clip. They are made with exactly the same findings that are used in ear clips--

Q That's right. A --and there is no pointed part, nothing at all on the top part of that clip that could hold -- that could make this clip hold on the material.

Q You are a business man. Do you think that [278] a firm can sell

hundreds of thousands of dollars of an item if the item did not work practically? A Well, I mean, I don't want to answer that question. I am no judge on that.

Q I show you Defendants' Exhibit R -- just take that in your hands -- which is a folder. Would you say that the statements made in there are untrue or true? A The one statement is true. It says "easily removable," and that is a sure thing because they don't hold -- to my opinion they do not hold.

Q How about the other statements? A The other statement would be correct on that, would be no loss when the garment is sent to the cleaner, because you can remove them. That's correct.

Now, the third statement, which says "can be used as a clip or for other decorative purpose." Well, as a clip, they are clips.

The fourth statement is "can be used as earrings." That statement is correct. But I don't see any point to saying that it can be used as a dress clip in here.

[279]

Q Well, I call your attention to the statement there "can be used as clips or for other decorative purposes." In your opinion can this be used for a clip or for any other decorative purpose?

A When a woman buys--

Q Answer yes or no. A When a woman buys it, she can use it for whatever she wants to, but that doesn't say that she will be -- if it is an item of -- a 25-cent item, she would not care of losing it or not.

Q But you can use it, though, is that right? A Well, I mean she can do whatever she pleases with the earring when she gets it because I won't call this a dress clip. I call that an earring.

Q You haven't got two buttonholes in your jacket, but will you take the ornament from Exhibit U, and will you try to place that

through a buttonhole of your jacket and see whether it would hold?

A Well, it has been demonstrated before.

Q I am not referring to that, I am referring to this buttonhole. You have one right here. Take one of your buttonholes and then clamp it down and see whether it will hold. It holds, does it not?

A To a certain extent. You can pull it right off.

[280] Q You can pull them out with a prong, too, if you pull hard enough? A You got to open the clip. If you open the clip, yes. If you want, I can -- do you want to try?

Q It holds better.

Mr. Boucher, will you please take out one of your earrings from Exhibit 17? Now will you put it on your ear? A (Witness complies).

Q Now pull it. It comes off, does it not? A It does come off.

MR. SPARROW: Will the stenographer note that the witness has placed an earring from Exhibit 17 and applied it to his ear and pulled on it and it came off.

That is all, Mr. Boucher.

THE WITNESS: Listen, you can pull on it, you know, pull on it. Pull on it yourself.

THE COURT: But don't hurt him.

MR. SPARROW: It comes off so easily that it is a joke.

THE WITNESS: Those earrings are made the same way that all the other earrings are made.

[281]

THE COURT: I think it is a matter of common knowledge to most men of adult age that ladies are accustomed to losing earrings when receiving the embraces of man.

MR. SPARROW: That is the point. In other words, you

don't need prongs on it in order to attach it firmly because that is what happens. They lose their earrings.

THE COURT: There are other types of backs to earrings, aren't there, screw backs?

THE WITNESS: Yes.

THE COURT: And backs for pierced ears?

THE WITNESS: That's right. You use on the pieces in evidence what is known as clip ear-backs.

For screw backs and pierced ears we have a lot of requests for these also. We make them to order.

THE COURT: Those are backs of different construction?

THE WITNESS: That's right.

THE COURT: All right.

* * *

[Page 328, line 20 - Page 329, line 3]

THE COURT: Whether their intention was to copyright it or not is immaterial. The question is whether or not as a matter of fact and as a matter of law the copyright on this one in the case, 13, extended to include Exhibits 14 and 15. [329] I find that as a fact they do, and I conclude as a matter of law that it does. I find that the underlying design, representation here, is the same.

* * *

[338] COMPLAINT

AS AND FOR A FIRST CAUSE OF ACTION AGAINST THE DEFENDANT, DU BOYES, INC.

1. This is an action for copyright infringement arising under Title 17, United States Code, and for unfair competition, the jurisdiction of this Court being founded upon Title 28, United States Code, Section 1338.

2. Plaintiff, MARCEL BOUCHER, doing business under the name and style of BOUCHER has a regular and established place of business at 304 East 23rd Street, City of New York. Plaintiffs, MARCEL BOUCHER and JEANNE BOUCHER, are co-partners doing business under the firm name and style of MARCEL BOUCHER ET CIE., and having a regular and established place of business at 304 East 23rd Street, City of New York.

[339] 3. Plaintiffs are engaged in the design, manufacture and sale of jewelry of superior style and quality, including ladies costume jewelry, said jewelry is extensively advertised and sold throughout all of the United States and abroad; by reason of the plaintiffs' special knowledge and skiil acquired from many years spent in the design and production of their jewelry, plaintiffs have acquired and now possess an extremely enviable reputation in the trade and in the minds of the general public for the excellence, quality and appearance of their jewelry; because of the excellence of the plaintiffs' jewelry and its favorable reception by the trade and purchasing public, plaintiffs have built up over a period of approximately twenty years and are now possessed of a very valuable good will in the trade and among their customers and the purchasing public, which good will is one of the most important and valuable assets of the plaintiffs.

4. Defendant, DU BOYES, INC., is, upon information and belief, a domestic corporation having its regular and established place of business at 14 East 38th Street, City of New York, and is engaged in the ladies costume jewelry business.

5. Prior to June 14, 1954, plaintiff, MARCEL BOUCHER d/b/a BOUCHER, created, and caused to be created by his agents, servants and employees for hire, certain original works of art in the form of pieces of artistic ladies costume jewelry known as the "GOLD TEXTURE" line consisting in part of the following items, said plaintiff being the author and proprietor thereof:-

	Earring	- Style No. 5807
	Pin	- Style No. 5816
[340]	Pin	- Style No. 5859
	Pin	- Style No. 5860
	Necklace	- Style No. 5831
	Necklace	- Style No. 5838
	Pin	- Style No. 5882
	Pin	- Style No. 5883
	Bracelet	- Style No. 5806
	Necklace	- Style No. 5887
	Pin	- Style No. 5877
	Pin	- Style No. 5878
	Pin	- Style No. 5879
	Pin	- Style No. 5880

6. (a) The aforesaid jewelry pieces are works of artistic craftsmanship conceived as wholly original with the author thereof and constitute copyrightable subject matter under the laws of the United States. Plaintiffs secured copyrights for the same by first publishing

the same in the United States on or about June 14, 1954, by selling copies thereof, each said copy having the required copyright notice affixed thereto. Prior to June 14, 1954, plaintiff, MARCEL BOUCHER d/b/a BOUCHER duly licensed MARCEL BOUCHER and JEANNE BOUCHER d/b/a MARCEL BOUCHER ET CIE., to manufacture and sell reproductions of all of the said works of art and to use the copyrights thereof hereinbelow set forth.

(b) Between June 14, 1954, and September 21, 1954, plaintiffs complied in all respects with the Act of July 30, 1947, Title 17, United States Code, and all other laws governing copyright; and secured the exclusive rights and privileges in and to copyright of said works of art, and received from the Register of Copyrights certificates [341] of registration with respect to each of the items mentioned in Paragraph "5" hereof, dated and identified as follows:

September 21, 1954, G. P. 7115, Class G (Exhibit 1)

September 21, 1954, G. P. 7123, Class G (Exhibits 2, 3, 4)

September 21, 1954, G. P. 7109, Class G (Exhibits 5, 6)

September 21, 1954, G. P. 7107, Class G (Exhibits 7, 8)

September 21, 1954, G. P. 7124, Class G (Exhibit 9)

September 21, 1954, G. P. 7125, Class G (Exhibit 10)

September 21, 1954, G. P. 7106, Class G (Exhibits 11, 12)

September 21, 1954, G. P. 7111, Class G (Exhibits 13, 14)

(c) Since on or about June 14, 1954, reproductions of said works of art have been sold by plaintiffs, and all such reproductions made by plaintiffs or under their authority have been manufactured and sold in strict conformity with the provisions of the Act of July 30, 1947, Title 17, United States Code, and all other laws governing copyright.

(d) Plaintiffs, at all times herein, have been and still are the sole proprietors of all right, title and interest in and to the copyrights in said works of art.

7. Subsequent to September 21, 1954, defendant, DU BOYES, INC., infringed said copyrights by publishing, manufacturing and placing upon the market for sale certain items of costume jewelry which were copies from plaintiffs' copyrighted works of art described in Paragraphs "5" and "6" herein.

8. Prior to January 2, 1955, plaintiff, MARCEL BOUCHER d/b/a BOUCHER, created, and caused to be created by his [342] agents, servants and employees for hire, certain original works of art in the form of pieces of artistic ladies costume jewelry known as the "GOLD TEXTURE" line consisting in part of the following items, said plaintiff being the author and proprietor thereof:

Earring	-	Style No. 5917
Earring	-	Style No. 5918
Pin	-	Style No. 5928
Pin	-	Style No. 5946
Pin	-	Style No. 5929
Pin	-	Style No. 5947
Pin	-	Style No. 5971
Pin	-	Style No. 5945
Necklace	-	Style No. 5913
Earring	-	Style No. 5912
Bracelet	-	Style No. 5915
Pin	-	Style No. 5919
Pin	-	Style No. 5921
Earring	-	Style No. 5920

Earring - Style No. 5922

Pin - Style No. 5923

Pin - Style No. 5927

9. (a) The aforesaid jewelry pieces are works of artistic craftsmanship conceived as wholly original with the author thereof and constitute copyrightable subject matter under the laws of the United States. Plaintiffs secured copyrights for the same by first publishing the same in the United States on or about January 2, 1955, by selling copies thereof, each said copy [343] having the required copyright notice affixed thereto. Prior to June 14, 1954, plaintiff, MARCEL BOUCHER d/b/a BOUCHER duly licensed MARCEL BOUCHER and JEANNE BOUCHER d/b/a MARCEL BOUCHER ET CIE., to manufacture and sell reproductions of all of the said works of art and to use the copyrights thereof hereinbelow set forth.

(b) Between January 2, 1955, and March 9, 1955, plaintiffs complied in all respects with the Act of July 30, 1947, Title 17, United States Code, and all other laws governing copyright; and secured the exclusive rights and privileges in and to copyright of said works of art, and received from the Register of Copyrights certificates of registration with respect to each of the items mentioned in Paragraph "8" hereof, dated and identified as follows:

March 9, 1955, G. P. 7849, Class G (Exhibits 15, 16)

March 9, 1955, G. P. 7855, Class G (Exhibits 17, 18)

March 9, 1955, G. P. 7856, Class G (Exhibit 19)

March 9, 1955, G. P. 7866, Class G (Exhibits 20, 21, 22)

March 9, 1955, G. P. 7847, Class G (Exhibit 23)

March 9, 1955, G. P. 7846, Class G (Exhibit 24)

March 9, 1955, G. P. 7848, Class G (Exhibit 25)

March 9, 1955, G. P. 7850, Class G (Exhibit 26, 27)

March 9, 1955, G. P. 7851, Class G (Exhibits 28, 29)

March 9, 1955, G. P. 7852, Class G (Exhibit 30)

March 9, 1955, G. P. 7854, Class G (Exhibit 31)

(c) Since on or about January 2, 1955, reproductions [344] of said works of art have been sold by plaintiffs, and all such reproductions made by plaintiffs or under their authority have been manufactured and sold in strict conformity with the provisions of the Act of July 30, 1947, Title 17, United States Code, and all other laws governing copyright.

(d) Plaintiffs, at all times herein, have been and still are the sole proprietors of all right, title and interest in and to the copyrights in said works of art.

10. Subsequent to March 9, 1955, defendant, DU BOYES, INC., infringed said copyrights by publishing, manufacturing and placing upon the market for sale certain items of costume jewelry which were copies from plaintiffs' copyrighted works of art described in Paragraphs "8" and "9" herein.

11. The defendant named in this cause of action has had actual notice of its infringement of all of said copyrights herein described, and has continued to infringe said copyrights.

12. Plaintiffs have reproduced the aforesaid works of art for sale as ladies costume jewelry and have sold substantial quantities of such jewelry to the public since the dates of publication of each of said works of art, and will continue to offer such artistic costume jewelry for sale.

13. Inasmuch as there are a great number of infringing pieces of jewelry published, manufactured and placed upon the market

for sale by the several defendants, most of which are fragile, it is not feasible to annex copies thereof to the complaint. Said infringing pieces will be before the Court in all further proceedings to be had herein.

[345] 14. Plaintiffs have already expended many thousands of dollars in the national advertising and promotion of such jewelry, and intend to expend in the immediate future additional sums for national advertising and promotion.

15. Upon information and belief, continuously since before June 1, 1955, defendant, DU BOYES, INC., has been publishing, manufacturing, selling and otherwise marketing copies of all of plaintiffs' copyrighted works of art as described herein, and has been engaging in unfair trade practices and unfair competition against plaintiffs to plaintiffs' irreparable damage.

16. Upon information and belief, defendant, DU BOYES, INC., has purposely sought to trade on the good will and reputation of MARCEL BOUCHER and MARCEL BOUCHER ET CIE. by advising its customers that the pieces of costume jewelry sold by it are identical copies of "Boucher" original pieces.

17. Upon information and belief, defendant, DU BOYES, INC., has deliberately manufactured and sold its aforesaid infringing copies of plaintiffs' works of art with the intent and purpose to palm off the said copies as and for genuine and original works of art of the plaintiffs, and said palming off has occurred and will continue unless enjoined by the Court.

18. All of the defendants joined in this complaint are properly joined in one action under Rule 20 of the Federal Rules of Civil Procedure. Each cause of action asserted is based on infringe-

ment by the defendant named therein by reason of the public sale for profit of the copyrighted works of art set [346] forth herein. The copyright infringements by the defendants and acts of unfair competition complained of in each cause of action all occurred at the same time and are continuing at the present time; the causes of action joined in this complaint are governed by the same legal rules and involve similar facts. The convenient administration of justice will be promoted by such joinder, and a multiplicity of separate actions against the defendants, arising out of similar facts will be avoided. The questions of law and fact and the remedies sought are similar and common to each defendant in each cause of action herein.

AS AND FOR A SECOND CAUSE OF ACTION AGAINST THE DEFENDANT, ARKE, INC.

19. Plaintiffs repeat and reallege each and every allegation contained in Paragraphs "1", "2" and "3" herein.

20. Defendant, ARKE, INC., is, upon information and belief, a domestic corporation having its regular and established place of business at 411 Fifth Avenue, City of New York, and is engaged in the ladies costume jewelry business.

21. Plaintiffs repeat and reallege each and every allegation contained in Paragraphs "5" and "6" herein.

22. Subsequent to September 21, 1954, defendant, ARKE, INC., infringed said copyrights by publishing, manufacturing and placing upon the market for sale certain items of costume jewelry which were copies from plaintiffs' copyrighted works of art described in Paragraphs "5" and "6" herein.

[347] 23. Plaintiffs repeat and reallege each and every allegation contained in Paragraphs "8" and "9" herein.

24. Subsequent to March 9, 1955, defendant, ARKE, INC., infringed said copyrights by publishing, manufacturing and placing upon the market for sale certain items of costume jewelry which were copies from plaintiffs' copyrighted works of art described in Paragraphs "8" and "9" hereof.

25. Plaintiffs repeat and reallege each and every allegation contained in Paragraphs "11", "12", "13" and "14" herein.

26. Upon information and belief, continuously since before June 1, 1955, defendant, ARKE, INC., has been publishing, manufacturing, selling and otherwise marketing copies of all of plaintiffs' copyrighted works of art as described herein, and has been engaging in unfair trade practices and unfair competition against plaintiffs to plaintiffs' irreparable damage.

27. Upon information and belief, defendant, ARKE, INC., has purposely sought to trade on the good will and reputation of MARCEL BOUCHER and MARCEL BOUCHER ET CIE. by advising its customers that the pieces of costume jewelry sold by it are identical copies of "Boucher" original pieces.

28. Upon information and belief, defendant, ARKE, INC., has deliberately manufactured and sold its aforesaid infringing copies of plaintiffs' works of art with the intent and purpose to palm off the said copies as and for genuine and original works of art of the plaintiffs, and said palming off has occurred [348] and will continue unless enjoined by the Court.

29. Plaintiffs repeat and reallege each and every allegation contained in Paragraph "18" herein.

AS AND FOR A THIRD CAUSE OF ACTION AGAINST THE DEFENDANT, CAPRI JEWELRY, INC.

30. Plaintiffs repeat and reallege each and every allegation contained in Paragraphs "1", "2" and "3" herein.

31. Defendant, CAPRI JEWELRY, INC., is, upon information and belief, a domestic corporation, having its regular and established place of business at 389 Fifth Avenue, City of New York, and is engaged in the ladies costume jewelry business.

32. Plaintiffs repeat and reallege each and every allegation contained in Paragraphs "5" and "6" herein.

33. Subsequent to September 21, 1954, defendant, CAPRI JEWELRY, INC., infringed said copyrights by publishing, manufacturing and placing upon the market for sale certain items of costume jewelry which were copies from plaintiffs' copyrighted works of art described in Paragraphs "5" and "6" herein.

34. Plaintiffs repeat and reallege each and every allegation contained in Paragraphs "8" and "9" herein.

35. Subsequent to March 9, 1955, defendant, CAPRI JEWELRY, INC., infringed said copyrights by publishing, manufacturing and placing upon the market for sale certain items of costume jewelry which were copies from plaintiffs' copyrighted works of art described in Paragraphs "8" and "9" herein.

[349]

36. Plaintiffs repeat and reallege each and every allegation contained in Paragraphs "11", "12", "13" and "14" herein.

37. Upon information and belief, continuously since before June 1, 1955, defendant, CAPRI JEWELRY, INC. has been publishing, manufacturing, selling and otherwise marketing copies of all of plaintiffs' copyrighted works of art as described herein, and has been engaging in unfair trade practices and unfair competition against plaintiffs to plaintiffs' irreparable damage.

38. Upon information and belief, defendant, CAPRI JEWELRY, INC., has purposely sought to trade on the good will and reputation of MARCEL BOUCHER and MARCEL BOUCHER ET CIE. by advising its customers that the pieces of costume jewelry sold by it are identical copies of "Boucher" original pieces.

39. Upon information and belief, defendant, CAPRI JEWELERY, INC., has deliberately manufactured and sold its aforesaid infringing copies of plaintiffs' works of art with the intent and purpose to palm off the said copies as and for genuine and original works of art of the plaintiffs, and said palming off has occurred and will continue unless enjoined by the Court.

40. Plaintiffs repeat and reallege each and every allegation contained in Paragraph "18" herein.

AS AND FOR A FOURTH CAUSE OF ACTION AGAINST THE DEFENDANT, SIDNEY LISNER d/b/a D. LISNER & COMPANY

41. Plaintiffs repeat and reallege each and every allegation contained in Paragraphs "1", "2" and "3" herein.

[350] 42. Upon information and belief, defendant, SIDNEY LISNER, doing business under the firm name and style of D. LISNER & COMPANY, has a regular and established place of business at 393 Fifth Avenue, City of New York, and is engaged in the ladies costume jewelry business.

43. Plaintiffs repeat and reallege each and every allegation contained in Paragraphs "5" and "6" herein.

44. Subsequent to September 21, 1954, defendant, SIDNEY LISNER d/b/a D. LISNER & COMPANY, infringed said copyrights by publishing, manufacturing and placing upon the market for sale certain

items of costume jewelry which were copies from plaintiffs' copyrighted works of art described in Paragraphs "5" and "6" herein.

45. Plaintiffs repeat and reallege each and every allegation contained in Paragraphs "8" and "9" herein.

46. Subsequent to March 9, 1955, defendant, SIDNEY LISNER d/b/a D. LISNER & COMPANY, infringed said copyrights by publishing, manufacturing and placing upon the market for sale certain items of costume jewelry which were copies from plaintiffs' copyrighted works of art described in Paragraphs "8" and "9" herein.

47. Plaintiffs repeat and reallege each and every allegation contained in Paragraphs "11", "12", "13" and "14" herein.

48. Upon information and belief, continuously since before June 1, 1955, defendant, SIDNEY LISNER d/b/a D. LISNER & COMPANY, has been publishing, manufacturing, selling and otherwise
[351]
marketing copies of all of plaintiffs' copyrighted works of art as described herein, and has been engaging in unfair trade practices and unfair competition against plaintiffs to plaintiffs' irreparable damage.

49. Upon information and belief, defendant, SIDNEY LISNER d/b/a D. LISNER & COMPANY, has purposely sought to trade on the good will and reputation of MARCEL BOUCHER and MARCEL BOUCHER ET CIE. by advising his customers that the pieces of costume jewelry sold by him are identical copies of "Boucher" original pieces.

50. Upon information and belief, defendant, SIDNEY LISNER d/b/a D. LISNER & COMPANY has deliberately manufactured and sold his aforesaid infringing copies of plaintiffs' works of art with the intent and purpose to palm off the said copies as and for genuine and original works of art of the plaintiffs, and said palming off has

occurred and will continue unless enjoined by the Court.

51. Plaintiffs repeat and reallege each and every allegation contained in Paragraph "18" herein.

AS AND FOR A FIFTH CAUSE OF ACTION AGAINST THE DEFENDANTS, JULES STEINBERG AND I. SLOVITZ, d/b/a B. STEINBERG-KASLO COMPANY

52. Plaintiffs repeat and reallege each and every allegation contained in Paragraphs "1", "2" and "3" herein.

53. Upon information and belief, defendants, JULES STEINBERG and I. SLOVITZ are co-partners doing business under [352] the firm name and style of B. STEINBERG-KASLO COMPANY, and having a regular and established place of business at 7 West 36th Street, City of New York, and are engaged in the manufacture and sale of ladies costume jewelry.

54. Plaintiffs repeat and reallege each and every allegation contained in Paragraphs "5" and "6" herein.

55. Subsequent to September 21, 1954, defendants, JULES STEINBERG and I. SLOVITZ d/b/a B. STEINBERG-KASLO COMPANY, infringed said copyrights by publishing, manufacturing and placing upon the market for sale certain items of costume jewelry which were copies from plaintiffs' copyrighted works of art described in Paragraphs "5" and "6" herein.

56. Plaintiffs repeat and reallege each and every allegation contained in Paragraphs "8" and "9" herein.

57. Subsequent to March 9, 1955, defendants, JULES STEINBERG and I. SLOVITZ d/b/a B. STEINBERG-KASLO COMPANY, infringed said copyrights by publishing, manufacturing and placing upon the market for sale certain items of costume jewelry which were

copies from plaintiffs' copyrighted works of art described in Paragraphs "8" and "9" herein.

58. Plaintiffs repeat and reallege each and every allegation contained in Paragraphs "11", "12", "13" and "14" herein.

59. Upon information and belief, continuously since before June 1, 1955, defendants, JULES STEINBERG and I. SLOVITZ, d/b/a B. STEINBERG-Kaslo COMPANY, have been publishing, [353] manufacturing, selling and otherwise marketing copies of all of plaintiffs' copyrighted works of art as described herein, and has been engaging in unfair trade practices and unfair competition against plaintiffs to plaintiffs' irreparable damage.

60. Upon information and belief, defendants, JULES STEINBERG and I. SLOVITZ d/b/a B. STEINBERG-KASLO COMPANY, have purposely sought to trade on the good will and reputation of MARCEL BOUCHER and MARCEL BOUCHER ET CIE. by advising their customers that the pieces of costume jewelry sold by them are identical copies of "Boucher" original pieces.

61. Upon information and belief, defendants, JULES STEINBERG and I. SLOVITZ d/b/a B. STEINBERG-KASLO COMPANY, have deliberately manufactured and sold their aforesaid infringing copies of plaintiffs' works of art with the intent and purpose to palm off the said copies as and for genuine and original works of art of the plaintiffs, and said palming off has occurred and will continue unless enjoined by the Court.

62. Plaintiffs repeat and reallege each and every allegation contained in Paragraph "18" herein.

AS AND FOR A SIXTH CAUSE OF ACTION AGAINST THE DEFENDANT, VOLUPTE, INC.

63. Plaintiffs repeat and reallege each and every allegation contained in Paragraphs "1", "2" and "3" herein.

64. Upon information and belief, defendant, VOLUPTE, INC., is a domestic corporation having its regular and established place of business at 393 Fifth Avenue, City of New York, [354] and is engaged in the manufacture and sale of ladies costume jewelry.

65. Plaintiffs repeat and reallege each and every allegation contained in Paragraphs "5" and "6" herein.

66. Subsequent to September 21, 1954, defendant, VOLUPTE, INC., infringed said copyrights by publishing, manufacturing and placing upon the market for sale certain items of costume jewelry which were copies from plaintiffs' copyrighted works of art described in Paragraphs "5" and "6" herein.

67. Plaintiffs repeat and reallege each and every allegation contained in Paragraphs "8" and "9" herein.

68. Subsequent to March 9, 1955, defendant, VOLUPTE, INC., infringed said copyrights by publishing, manufacturing and placing upon the market for sale certain items of costume jewelry which were copies from plaintiffs' copyrighted works of art described in Paragraphs "8" and "9" herein.

69. Plaintiffs repeat and reallege each and every allegation contained in Paragraphs "11", "12", "13" and "14" herein.

70. Upon information and belief, continuously since before June 1, 1955, VOLUPTE, INC., has been publishing, manufacturing, selling and otherwise marketing copies of all of plaintiffs' copyrighted works of art as described herein, and has been engaging in unfair trade practices and unfair competition against plaintiffs to plaintiffs' irreparable damage.

71. Upon information and belief, defendant, VOLUPTE, INC., has purposely sought to trade on the good will and [355] reputation of MARCEL BOUCHER and MARCEL BOUCHER ET CIE. by advising its customers that the pieces of costume jewelry sold by it are identical copies of "Boucher" original pieces.

72. Upon information and belief, defendant, VOLUPTE, INC., has deliberately manufactured and sold its aforesaid infringing copies of plaintiffs' works of art with the intent and purpose to palm off the said copies as and for genuine and original works of art of the plaintiffs, and said palming off has occurred and will continue unless enjoined by the Court.

73. Plaintiffs repeat and reallege each and every allegation contained in Paragraph "18" herein.

AS AND FOR A SEVENTH CAUSE OF ACTION AGAINST THE DEFENDANT, WALTER HEIMLER, INC.

74. Plaintiffs repeat and reallege each and every allegation contained in Paragraphs "1", "2" and "3" herein.

75. Upon information and belief, defendant, WALTER HEIMLER, INC., is a domestic corporation having its regular and established place of business at 15 West 34th Street, City of New York, and is engaged in the ladies costume jewelry business.

76. Plaintiffs repeat and reallege each and every allegation contained in Paragraphs "5" and "6" herein.

77. Subsequent to September 21, 1954, defendant, WALTER HEIMLER, INC., infringed said copyrights by publishing, manufacturing and placing upon the market for sale certain items of costume jewelry which were copies from plaintiffs' copyrighted works of art described in Paragraphs "5" and "6" herein.

[356] 78. Plaintiffs repeat and reallege each and every allegation contained in Paragraphs "8" and "9" herein.

79. Subsequent to March 9, 1955, defendant, WALTER HEIMLER, INC., infringed said copyrights by publishing, manufacturing and placing upon the market for sale certain items of costume jewelry which were copies from plaintiffs' copyrighted works of art described in Paragraphs "8" and "9" herein.

80. Plaintiffs repeat and reallege each and every allegation contained in Paragraphs "11", "12", "13" and "14" herein.

81. Upon information and belief, continuously since before June 1, 1955, defendant, WALTER HEIMLER, INC., has been publishing, manufacturing, selling and otherwise marketing copies of all of plaintiffs' copyrighted works of art as described herein, and has been engaging in unfair trade practices and unfair competition against plaintiffs to plaintiffs' irreparable damage.

82. Upon information and belief, defendant, WALTER HEIMLER, INC., has purposely sought to trade on the good will and reputation of MARCEL BOUCHER and MARCEL BOUCHER ET CIE. by advising its customers that the pieces of costume jewelry sold by it are identical copies of "Boucher" original pieces.

83. Upon information and belief, defendant, WALTER HEIMLER, INC., has deliberately manufactured and sold its aforesaid infringing copies of plaintiffs' works of art with the intent and purpose to palm off the said copies as and for genuine and original works of art of the plaintiffs, and said palming off has occurred and will continue unless enjoined by the Court.

[357]

84. Plaintiffs repeat and reallege each and every allegation contained in Paragraph "18" herein.

WHEREFORE, plaintiffs demand:

1. That the defendants, DU BOYES, INC., ARKE, INC., CAPRI JEWELRY, INC., SIDNEY LISNER d/b/a D. LISNER & COMPANY, JULES STEINBERG and I. SLOVITZ d/b/a B. STEINBERG-KASLO COMPANY, VOLUPTE, INC., and WALTER HEIMLER, INC., and each of them, and their officers, agents, servants, employees and attorneys and all persons in active concert with them, be enjoined during the pendency of this action and permanently from infringing said copyrights of the plaintiffs in any manner, and from publishing, selling, manufacturing, marketing, or otherwise disposing of any copies of plaintiffs' copyrighted costume jewelry.

2. That said defendants, and each of them, their officers, agents, servants, employees and attorneys and all persons in active concert with them, be enjoined during the pendency of this action and permanently from representing to the trade or otherwise that their jewelry items as aforesaid are copies of items originally designed by Marcel Boucher and from attempting to palm off and sell such jewelry on the basis of such representation.

3. That the defendants and each of them be required to pay to plaintiffs such damages as plaintiffs have sustained in consequence of defendants' infringements of said copyrights and said unfair trade practices and unfair competition and to account for

(a) all gains, profits and advantages derived by the defendants, and each of them, by said trade practices and unfair competition, and

(b) all gains, profits and advantages derived by defendants by their infringement of plaintiffs copyrights and such damages as to the Court shall appear proper

within the provisions of the copyright statute, but not less than two hundred and fifty dollars.

4. That the defendants, and each of them, be required to deliver up to be impounded during the pendency of this action all copies of plaintiffs' said costume jewelry in their possession or under their control and to deliver up for destruction all infringing copies and all molds and other matter for making such infringing copies.

5. That defendants pay to plaintiffs the costs of this action and reasonable attorneys' fees to be allowed to plaintiffs by the Court.

6. That plaintiffs have such other and further relief as to the Court seems just and proper.

FORSYTHE, McGOVERN & FETZER,
Attorneys for Plaintiffs,
No. 405 Lexington Avenue,
New York 17, N. Y.

By /s/ Thomas A. McGovern
A Member of the Firm

Of Counsel:

BURTON L. KNAPP,
295 Madison Avenue,
New York 17, N. Y.

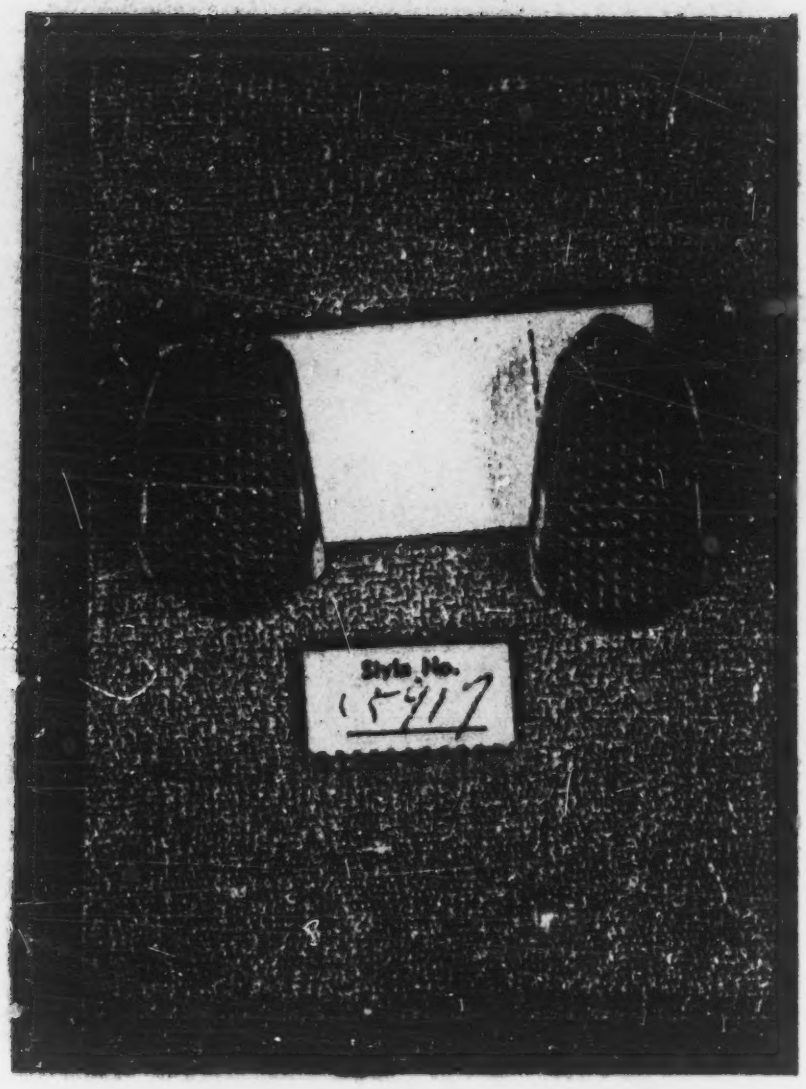
Earring - Style No. 5807 - GP 7115G

Pin - Style No. 5816 - GP 7123G

Necklace - Style No 5831 - GP 7109G

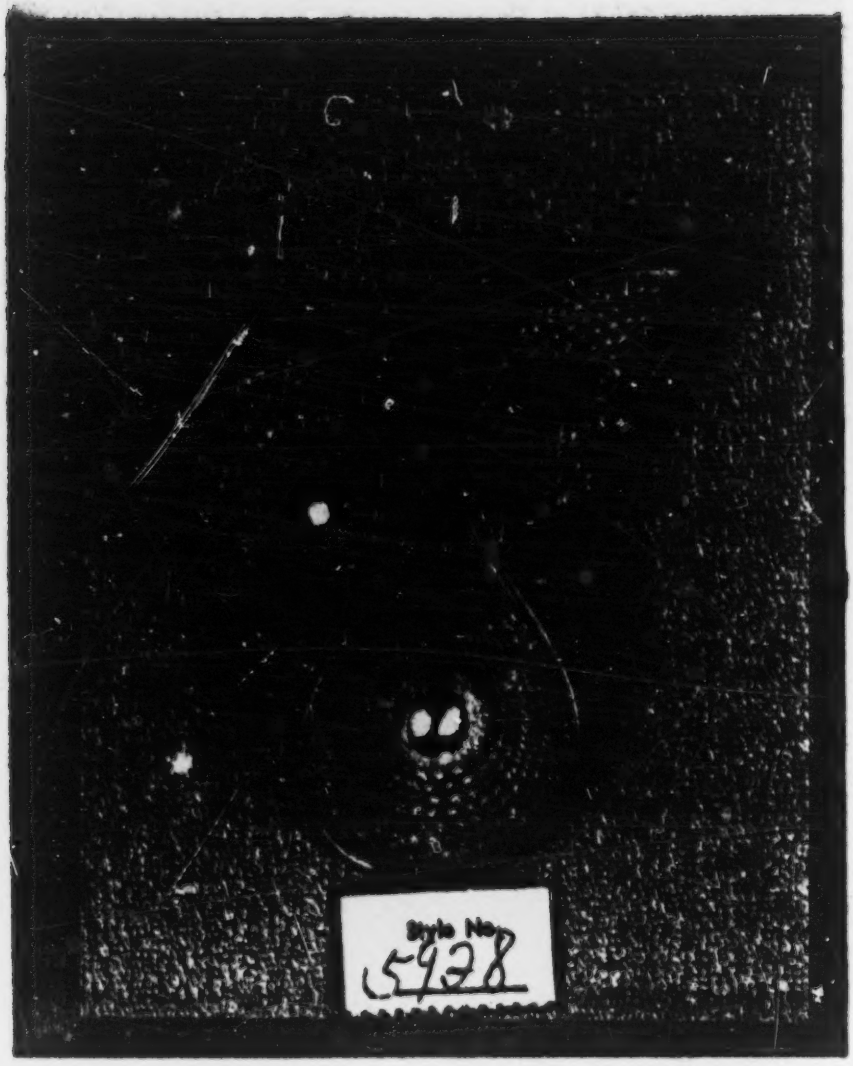
Pin - Style No. 5877 - GP 7106G

Earrings - Style No. 5917 - GP 7849G 82a5



82a6

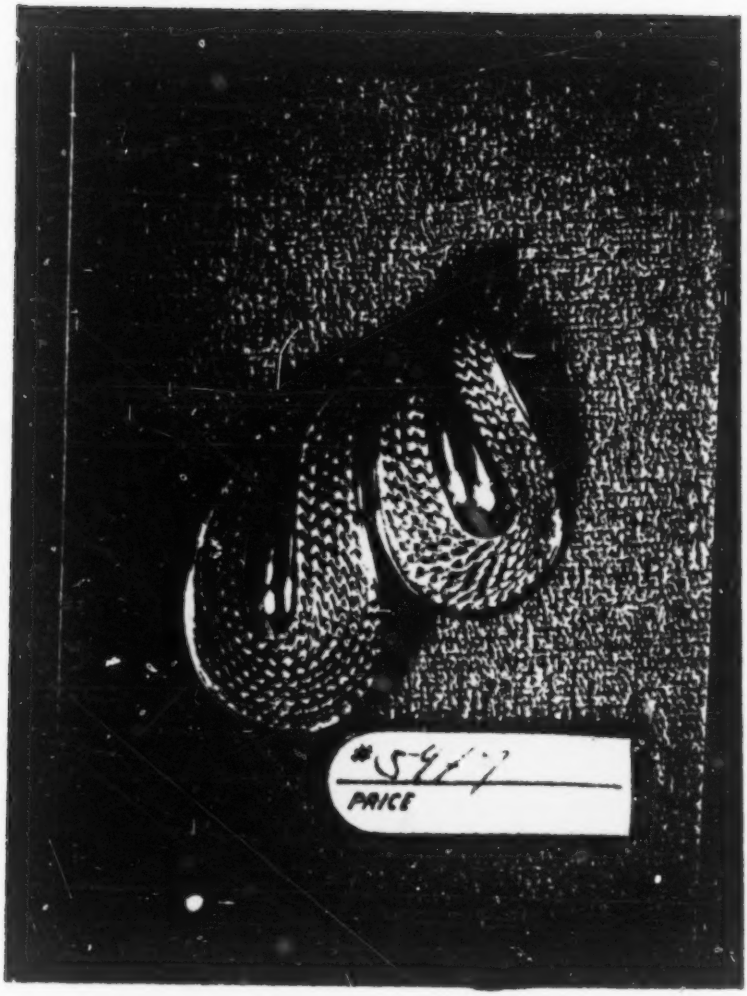
Pin - Style No. 5928 - GP 7855G



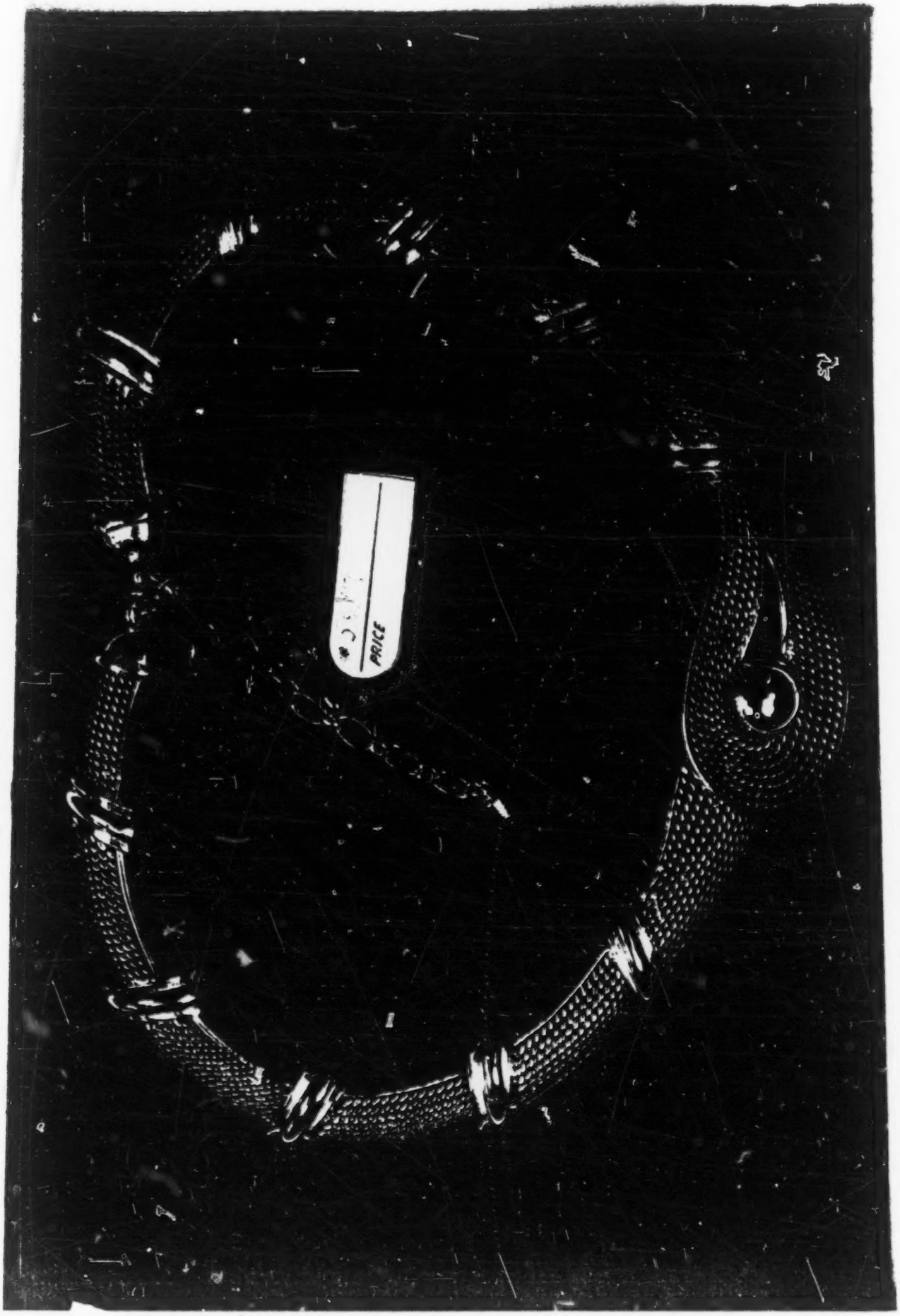
Pin - Style No. 5929 - GP 7856G

82a7

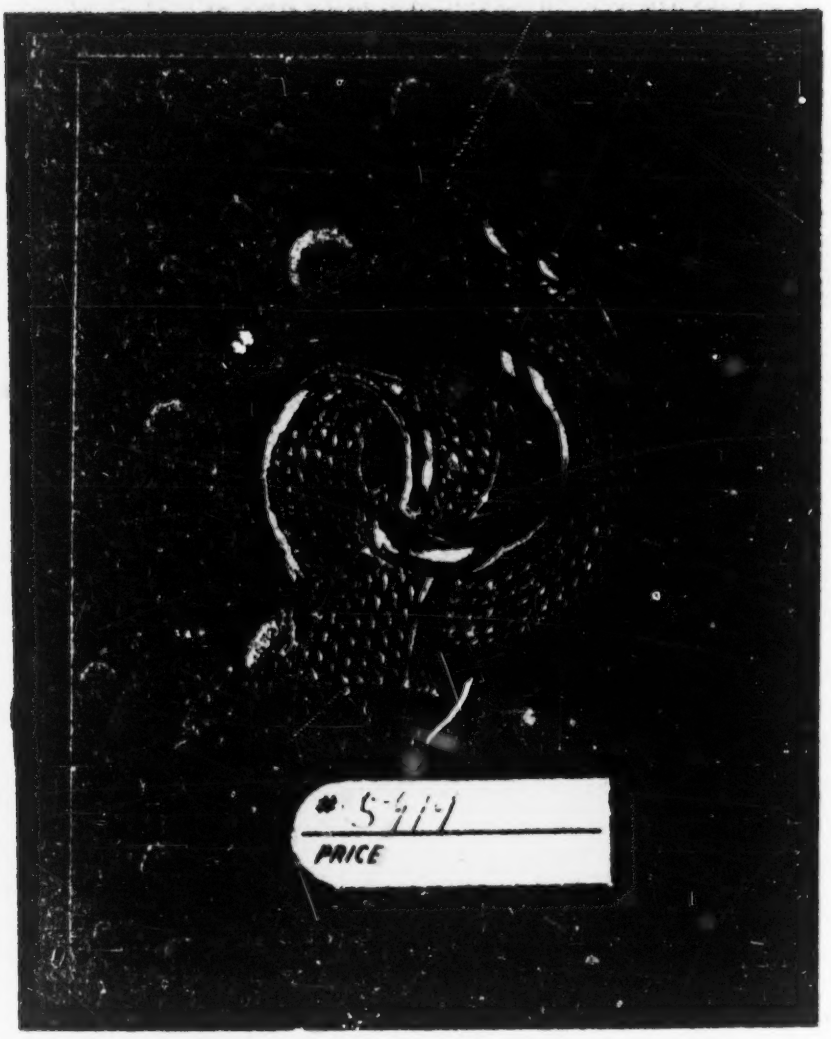
Pin - Style No. 5947 - GP 7866G



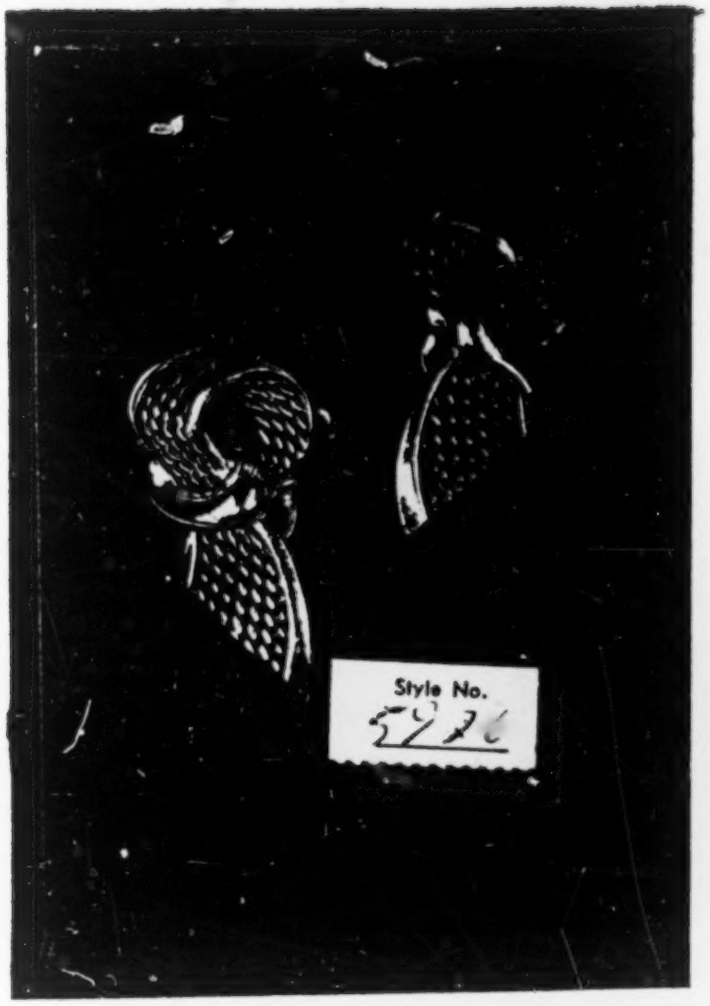
Necklace - Style No. 5913 - GP 7847G



82a10 Pin - Style No. 5919 - GP 7850G



Earrings - Style No. 5920 - GP 7851G 82a11



[400]

ANSWER AND COUNTERCLAIM

Now come the defendants, CAPRI JEWELRY, INC., D. LISNER, & CO., INC., (sued as Sidney Lisner d/b/a D. Lisner & Company), JULES STEINBERG, MORRIS KIMMELMAN, HYMAN SLOVITT, ABRAHAM J. SLOVITT and SAMUEL FRIEDMAN, (sued as JULES STEINBERG and I. SLOVITT), d/b/a B. STEINBERG-KASLO CO., VOLUPTE, INC., and WALTER HEIMLER, INC., for answer to the Complaint against them and each of them herein, state:

FIRST DEFENSE

The Complaint fails to state a claim against the said defendants upon which relief can be granted.

SECOND DEFENSE

The Court lacks jurisdiction over the plaintiffs, MARCEL BOUCHER and JEANNE BOUCHER d/b/a MARCEL BOUCHER ET CIE.

THIRD DEFENSE

Plaintiffs failed to publish the respective works alleged in [401]
the Complaint to be copyrighted and infringed, with notice in the manner and form as required by Section 10 of Title 17, United States Code, and, therefore, each and every one of said alleged copyrights mentioned in the Complaint are void, invalid, have no legal effect and are dedicated to the public.

FOURTH DEFENSE

Plaintiffs failed to comply with the form of notice prescribed by Section 19, of Title 17, United States Code, in force at the time of the publications of the works alleged to be copyrighted and infringed, and, therefore, each and every one of said alleged copyrights

mentioned in the Complaint herein are void, invalid, have no legal effect and are dedicated to the public.

FIFTH DEFENSE

Plaintiffs have failed to affix the notice of copyright to each copy or reproduction of the alleged copyrighted works published or offered for sale as required by Section 10 of Title 17, United States Code, and, therefore, each and every one of said alleged copyrights are void, invalid, have no legal effect and are dedicated to the public.

SIXTH DEFENSE

Any intended notice carried by each of the works alleged to be infringed and reproductions thereof is incomplete in itself and not distinct or recognizable upon reasonable inspection as a notice of copyright, and does not appear on the face thereof as required by the Copyright Law.

SEVENTH DEFENSE

The plaintiff, MARCEL BOUCHER, d/b/a BOUCHER, acquiesced in and authorized the publication of each of its said works by [402]
the other plaintiff, MARCEL BOUCHER and JEANNE BOUCHER d/b/a MARCEL BOUCHER ET CIE, without the copyright notice as, or not in the form and/or manner required or prescribed by the Copyright Laws of the United States (Sections 10 and 19 of Title 17, U.S.C.) in force at the time of the publications of said works, and copies or reproductions of the works complained about herein by the plaintiffs were sold to and appeared among retailers and others with the plaintiffs knowledge and consent without notice or without adequate notice, and said plaintiff, MARCEL BOUCHER d/b/a BOUCHER, by such acquiescense and/or authorization dedicated the same to the public and

waived any copyright protection thereof, and is now estopped to claim any rights therein.

EIGHTH DEFENSE

With respect to the works of ladies costume jewelry mentioned in paragraphs numbered 5 and 8 of the Complaint herein and alleged to be protected by the copyrights issued under the Certificates of Registration of Claims to Copyright mentioned and identified in paragraphs numbered 6(b) and 9(b) of the Complaint herein, the following works or costume jewelry pieces are different from those deposited in the Copyright Office as required under the Copyright Law and bear titles different from those stated and claimed in said Certificates of Registration, and, therefore, are not copyrighted thereunder and are now dedicated to the public. Any alleged copyright notice or portion of copyright notice appearing on the following works or costume jewelry pieces is misleading, deceptive and legally ineffective. Plaintiffs have attempted to obtain copyright protection on more than one work in one registration and for only a single statutory registration fee.

The works or pieces of costume jewelry referred to in [403] this Eighth Defense are as follows:

Pin--	Style No. 5859
Pin--	Style No. 5860
Necklace--	Style No. 5838
Pin--	Style No. 5883
Pin--	Style No. 5878
Pin--	Style No. 5880
Earring--	Style No. 5918
Pin--	Style No. 5946
Pin--	Style No. 5971

Pin--	Style No. 5945
Pin--	Style No. 5921
Earring--	Style No. 5922

NINTH DEFENSE

With respect to the alleged copyrighted works or pieces of costume jewelry specifically mentioned in the foregoing Eighth Defense, the plaintiffs have not complied with the provisions of Section 13 of Title 17, United States Code and the Rules and Regulations of the Copyright Office. The alleged copyrights have failed in their preservation and/or protection and have no legal effect because the plaintiffs failed to file after publication of said works or pieces of costume jewelry two copies of each thereof with the Register of Copyrights and/or to make application for a claim of copyright with the Register of Copyrights on each thereof and to accompany the same with the statutory registration fee, and, therefore, this action for infringement cannot be maintained.

[404]

TENTH DEFENSE

The Works alleged to be copyrighted are not works of artistic craftsmanship or works of art protectable under the Copyright Laws and have not been originally created, designed or conceived by the plaintiff MARCEL BOUCHER, and said MARCEL BOUCHER is not the author of said works, and said material is not proper subjects of copyright.

ELEVENTH DEFENSE

Plaintiffs are in Court with unclean hands because they have designated and sold and are continuing to designate and sell copies or reproductions of the said works allegedly copyrighted under

the misleading and deceptive name and description "GOLD TEXTURE", when in truth and in fact the said copies or reproductions of the said works of ladies costume jewelry are not made of gold. The public is thus led to believe that it is purchasing items made of gold.

The Defendant, CAPRI JEWELRY, INC., for answer to the Third Cause of Action alleged in the Complaint, states:

1. Defendant admits that this is an action for alleged copyright infringement arising under Title 17, United States Code and that jurisdiction of this Court is founded upon Title 28, United States Code, Section 1338, and otherwise denies the allegations contained in paragraphs numbered 1 and 30 of the Complaint.

2. Defendant admits the allegations contained in paragraphs numbered 2 and 30 of the Complaint.

3. Defendant has no knowledge or information sufficient [405] to form a belief as to the allegations contained in paragraphs numbered 3 and 30 of the Complaint, and, therefore, denies the same and leaves plaintiffs to their proof thereof.

4. Defendant admits the allegations of paragraphs numbered 31 of the Complaint.

5. Defendant denies the allegations contained in paragraphs numbered 5 and 32 of the Complaint, except that on information defendant believes that plaintiffs, MARCEL BOUCHER and JEANNE BOUCHER d/b/a MARCEL BOUCHER ET CIE., manufactured and sold reproductions of articles of ladies costume jewelry mentioned in said paragraph 5.

6. (a) Answering paragraphs 6(a) and 32 of the Complaint herein, said Defendant denies that the jewelry pieces mentioned in paragraph numbered 5 of the Complaint are works of artistic craftsmanship conceived as wholly original with the alleged author thereof and

constitute copyrightable subject matter under the laws of the United States; that plaintiffs secured copyrights for the same by first publishing the same in the United States on or about June 14, 1954, by selling copies thereof, each said copy having the required copyright notice affixed thereto. Defendant has no knowledge or information sufficient to form a belief as to the allegations that prior to June 14, 1954, plaintiff, MARCEL BOUCHER d/b/a BOUCHER duly licensed MARCEL BOUCHER and JEANNE BOUCHER d/b/a MARCEL BOUCHER ET CIE., to manufacture and sell reproductions of all of the said alleged works of art and to use the alleged copyrights thereof set forth in said paragraph 6, and, therefore, denies the same and leaves plaintiffs to their proof thereof.

(b) Defendant denies the allegations contained in [406] paragraphs numbered 6(b) and 32 of the Complaint, except that defendant admits that there were issued by the Copyright Office Certificates of Registration of Claims to Copyright identified in said paragraph 6(b), but denies that said Certificates of Registration were legally issued or are valid, or secured to plaintiffs or either of them any copyrights in said works or any right to sue for copyright infringement.

(c) Defendant denies the allegations contained in paragraphs numbered 6(c) and 32 of the Complaint, except that defendant is informed that the plaintiff, MARCEL BOUCHER and JEANNE BOUCHER d/b/a MARCEL BOUCHER ET CIE., have sold reproductions of the articles of costume jewelry mentioned in paragraph numbered 5 of the Complaint.

(d) Defendant has no knowledge or information sufficient to form a belief as to the allegations contained in paragraphs

numbered 6(d) and 32 of the Complaint, and, therefore, denies the same and leaves plaintiffs to their proof thereof.

7. Defendant denies the allegations contained in paragraph numbered 33 of the Complaint.

8. Defendant denies the allegations contained in paragraphs numbered 8 and 34 of the Complaint, except that on information and belief defendant believes that the plaintiffs MARCEL BOUCHER and JEANNE BOUCHER d/b/a MARCEL BOUCHER ET CIE, manufactured and sold reproductions of articles of ladies costume jewelry mentioned in said paragraph 8.

9. Answering paragraphs 9(a) and 34 of the Complaint herein, defendant denies that the jewelry pieces mentioned in paragraph numbered 8 of the Complaint are works of art of artistic craftsmanship conceived as wholly original with the alleged author thereof and constitute copyrightable subject matter under the laws of the United States; that plaintiffs secured copyrights [407] for the same by first publishing the same in the United States on or about January 2, 1955, by selling copies thereof, each said copy having the required copyright notice affixed thereto, Defendant has no knowledge or information sufficient to form a belief as to the allegations that prior to June 14, 1954, plaintiff, MARCEL BOUCHER d/b/a BOUCHER duly licensed MARCEL BOUCHER and JEANNE BOUCHER d/b/a MARCEL BOUCHER ET CIE., to manufacture and sell reproductions of all of the said alleged works of art and to use the alleged copyrights thereof set forth in said paragraph 9, and, therefore, denies the same and leaves plaintiffs to their proof thereof.

(b) Defendant denies the allegations contained in paragraphs numbered 9(b) and 34 of the Complaint, except that defend-

ant admits that there were issued by the Copyright Office Certificates of Registration of Claims to Copyright identified in said paragraph 9 (b), but denies that said Certificates of Registration were legally issued or are valid, or secured to Plaintiffs or either of them any copyrights in said works or any right to sue for copyright infringement.

(c) Defendant denies the allegations contained in paragraphs numbered 9(c) and 34 of the Complaint, except that defendant is informed that plaintiffs, MARCEL BOUCHER and JEANNE BOUCHER d/b/a MARCEL BOUCHER ET CIE., have sold reproductions of articles of costume jewelry mentioned in paragraph numbered 8 of the Complaint.

(d) Defendant has no knowledge or information sufficient to form a belief as to the allegations contained in paragraphs numbered 9(d) and 34 of the Complaint, and, therefore, denies the same and leaves plaintiffs to their proof thereof.

[408]

10. Defendant denies the allegations contained in paragraph numbered 35 of the Complaint.

11. Defendant denies the allegations contained in paragraphs numbered 11 and 36 of the Complaint.

12. Defendant admits that the plaintiffs, MARCEL BOUCHER and JEANNE BOUCHER d/b/a MARCEL BOUCHER ET CIE., have reproduced the alleged works of art for sale as ladies costume jewelry and have sold the same, but has no knowledge or information sufficient to form a belief that they have been sold by the plaintiffs herein in substantial quantities to the public since the dates of alleged publication of each of said alleged works of art, and that the plaintiffs will continue to offer such costume jewelry for sale, and therefore denies the same and leaves plaintiffs to their proof thereof.

13. Defendant denies the allegations contained in paragraphs numbered 13 and 36 of the Complaint, and specifically denies infringement of any of the alleged copyrights of the plaintiffs.

14. Defendant has no knowledge or information sufficient to form a belief as to the allegations contained in paragraphs numbered 14 and 36 of the Complaint, and, therefore, denies the same and leaves the plaintiffs to their proofs thereof.

15. Defendant denies the allegations contained in paragraph numbered 37 of the Complaint.

16. Defendant denies the allegations contained in paragraph numbered 38 of the Complaint.

17. Defendant denies the allegations contained in paragraph numbered 39 of the Complaint.
[409]

18. Defendant denies the allegations and statements contained and made by the plaintiffs in paragraphs numbered 18 and 40 of the Complaint.

19. Defendant repeats and reasserts the eleven specific defenses set forth in this Answer and Counterclaim.

The defendant, D. LISNER & CO. INC., sued as SIDNEY LISNER d/b/a D. LISNER & COMPANY, for answer to the Fourth Cause of Action alleged in the Complaint, states:

20. Defendant admits that this is an action for alleged copyright infringement arising under Title 17, United States Code and that jurisdiction of this Court is founded upon Title 28, United States Code, Section 1338, and otherwise denies the allegations contained in paragraphs numbered 1 and 41 of the Complaint.

21. Defendant admits the allegations contained in paragraphs numbered 2 and 41 of the Complaint.

22. Defendant has no knowledge or information sufficient to form a belief as to the allegations contained in paragraphs numbered 3 and 41 of the Complaint, and, therefore, denies the same and leaves plaintiffs to their proof thereof.

23. Defendant admits the allegations of paragraph numbered 42 of the Compiaint, except that its true name is D. LISNER AND CO., INC.

24. Defendant denies the allegations contained in paragraphs numbered 5 and 43 of the Complaint, except that on information
[410]
defendant believes that plaintiffs, MARCEL BOUCHER and JEANNE BOUCHER d/b/a MARCEL BOUCHER ET CIE., manufactured and sold reproductions of articles of ladies costume jewelry mentioned in said paragraph 5.

25. (a) Answering paragraphs 6(a) and 43 of the Complaint herein, said defendant denies that the jewelry pieces mentioned in paragraph numbered 5 of the Complaint are works of artistic craftsmanship conceived as wholly original with the alleged author thereof and constitute copyrightable subject matter under the laws of the United States: that plaintiffs secured copyrights for the same by first publishing the same in the United States on or about June 14, 1954, by selling copies thereof, each said copy having the required copyright notice affixed thereto. Defendant has no knowledge or information sufficient to form a belief as to the allegations that prior to June 14,1954, plaintiff, MARCEL BOUCHER d/b/a BOUCHER duly licensed MARCEL BOUCHER and JEANNE BOUCHER d/b/a MARCEL BOUCHER ET CIE., to manufacture and sell reproductions of all of the said alleged works of art and to use the alleged copyrights thereof set forth in said paragraph 6, and, therefore, denies the same and

leaves plaintiffs to their proof thereof.

(b) Defendant denies the allegations contained in paragraphs numbered 6(b) and 43 of the Complaint, except that defendant admits that there were issued by the Copyright Office Certificates of Registration of Claims to Copyright identified in said paragraph 6(b), but denies that said Certificates of Registration were legally issued or are valid, or secured to plaintiffs or either of them any copyrights in said works or any right to sue for copyright infringement.

[411] (c) Defendant denies the allegations contained in paragraph numbered 6(c) and 43 of the Complaint, except that defendant is informed that the plaintiff, MARCEL BOUCHER and JEANNE BOUCHER d/b/a MARCEL BOUCHER ET CIE., have sold reproductions of the articles of costume jewelry mentioned in paragraph numbered 5 of the Complaint.

(d) Defendant has no knowledge or information sufficient to form a belief as to the allegations contained in paragraph numbered 6(d) and 43 of the Complaint, and, therefore, denies the same and leaves plaintiffs to their proof thereof.

26. Defendant denies the allegations contained in paragraph numbered 44 of the Complaint.

27. Defendant denies the allegations contained in paragraphs numbered 8 and 45 of the Complaint, except that on information and belief defendant believes that the plaintiffs, MARCEL BOUCHER and JEANNE BOUCHER d/b/a MARCEL BOUCHER ET CIE., manufactured and sold reproductions of articles of ladies costume jewelry mentioned in said paragraph 8.

28. Answering paragraphs 9(c) and 45 of the Complaint herein, defendant denies that the jewelry pieces mentioned in

paragraph numbered 8 of the Complaint are works of art of artistic craftsmanship conceived as wholly original with the alleged author thereof and constitute copyrightable subject matter under the laws of the United States; that plaintiffs secured copyrights for the same by first publishing the same in the United States on or about January 2, 1955, by selling copies thereof, each said copy having the required copyright notice affixed thereto. Defendant has no knowledge or information sufficient to form a belief as to the allegations that prior [412] to June 14,1954, plaintiff, MARCEL BOUCHER d/b/a BOUCHER duly licensed MARCEL BOUCHER and JEANNE BOUCHER d/b/a MARCEL BOUCHER ET CIE., to manufacture and sell reproductions of all of the said alleged works of art and to use the alleged copyrights thereof set forth in said paragraph 9, and, therefore, denies the same and leaves plaintiffs to their proof thereof.

(b) Defendant denies the allegations contained in paragraphs numbered 9(b) and 45 of the Complaint, except that defendant admits that there were issued by the Copyright Office Certificates of Registration of Claims to Copyright identified in said paragraph 9 (b), but denies that said Certificates of Registration were legally issued or are valid, or secured to plaintiffs or either of them any copyrights in said works or any right to sue for copyright infringement.

(c) Defendant denies the allegations contained in paragraphs numbered 9(c) and 45 of the Complaint, except that defendant is informed that plaintiffs, MARCEL BOUCHER and JEANNE BOUCHER d/b/a MARCEL BOUCHER ET CIE., have sold reproductions of articles of costume jewelry mentioned in paragraph numbered 8 of the Complaint.

(d) Defendant has no knowledge or information

sufficient to form a belief as to the allegations contained in paragraphs numbered 9(d) and 45 of the Complaint, and, therefore, denies the same and leaves plaintiffs to their proof thereof.

29. Defendant denies the allegations contained in paragraph numbered 46 of the Complaint.

30. Defendant denies the allegations contained in paragraphs numbered 11 and 47 of the Complaint.

[413] 31. Defendant admits that the plaintiffs MARCEL BOUCHER and JEANNE BOUCHER d/b/a MARCEL BOUCHER ET CIE., have reproduced the alleged works of art for sale as ladies costume jewelry and have sold the same, but has no knowledge or information sufficient to form a belief that they have been sold by the plaintiffs herein in substantial quantities to the public since the dates of alleged publication of each of said alleged works of art, and that the plaintiffs will continue to offer such costume jewelry for sale, and, therefore denies the same and leaves plaintiffs to their proof thereof.

32. Defendant denies the allegations contained in paragraph numbered 13 and 47 of the Complaint, and specifically denies infringement of any of the alleged copyrights of the plaintiffs.

33. Defendant has no knowledge or information sufficient to form a belief as to the allegations contained in paragraph 14 and 47 of the Complaint, and, therefore, denies the same and leaves the plaintiffs to their proofs thereof.

34. Defendant denies the allegations contained in paragraph numbered 48 of the Complaint.

35. Defendant denies the allegations contained in paragraph numbered 49 of the Complaint.

36. Defendant denies the allegations contained in paragraph

numbered 50 of the Complaint.

37. Defendant denies the allegations and statements contained and made by the plaintiffs in paragraph numbered 18 and 51 of the Complaint.

[414] 38. Defendant repeats and reasserts the eleven specific defenses set forth in this Answer and Counterclaim.

The defendants, JULES STEINBERG, MORRIS KIMMELMAN, HYMAN SLOVITT, ABRAHAM J. SLOVITT and SAMUEL FRIEDMAN, (sued as JULES STEINBERG and I. SLOVIT) d/b/a B. STEINBERG-KASLO CO., for answer to the Fifth Cause of Action alleged in the Complaint, states:

39. Defendants admit that this is an action for alleged copyright infringement arising under Title 17, United States Code and that jurisdiction of this Court is founded upon Title 28, United States Code, Section 1338, and otherwise denies the allegations contained in paragraphs numbered 1 and 52 of the Complaint.

40. Defendants admit the allegations contained in paragraphs numbered 2 and 52 of the Complaint.

41. Defendants have no knowledge or information sufficient to form a belief as to the allegations contained in paragraphs numbered 3 and 52 of the Complaint, and, therefore, deny the same and leave plaintiffs to their proof thereof.

42. Defendants admit the allegations of paragraph numbered 53 of the Complaint.

43. Defendants deny the allegations contained in paragraphs numbered 5 and 54 of the Complaint, except that on information defendant believes that plaintiffs, MARCEL BOUCHER and JEANNE BOUCHER d/b/a MARCEL BOUCHER ET CIE., manufactured

and sold reproductions of articles of ladies costume jewelry mentioned in said paragraph 5.

[415] 44. (a) Answering paragraphs 6(a) and 54 of the Complaint herein, said defendants deny that the jewelry pieces mentioned in paragraph numbered 5 of the Complaint are works of artistic craftsmanship conceived as wholly original with the alleged author thereof and constitute copyrightable subject matter under the laws of the United States; that plaintiffs secured copyrights for the same by first publishing the same in the United States on or about June 14, 1954, by selling copies thereof, each said copy having the required copyright notice affixed thereto. Defendants have no knowledge or information sufficient to form a belief as to the allegations that prior to June 14, 1954, plaintiff, MARCEL BOUCHER d/b/a BOUCHER duly licensed MARCEL BOUCHER and JEANNE BOUCHER d/b/a MARCEL BOUCHER ET CIE., to manufacture and sell reproductions of all of the said alleged works of art and to use the alleged copyrights thereof set forth in said paragraph 6, and, therefore, deny the same and leave plaintiffs to their proof thereof.

(b) Defendants deny the allegations contained in paragraphs numbered 6(b) and 54 of the Complaint, except that defendant admits that there were issued by the Copyright Office Certificates of Registration of Claims to Copyright identified in said paragraph 6(b), but denies that said Certificates of Registration were legally issued or are valid, or secured to plaintiffs or either of them any copyrights in said works or any right to sue for copyright infringement.

(c) Defendants deny the allegations contained in paragraphs numbered 6(c) and 54 of the Complaint, except that defendant is informed that the plaintiffs, MARCEL BOUCHER and JEANNE

BOUCHER d/b/a MARCEL BOUCHER ET CIE., have sold reproductions of articles of costume jewelry mentioned in paragraph numbered 5 of the Complaint.

[416] (d) Defendants have no knowledge or information sufficient to form a belief as to the allegations contained in paragraphs numbered 6(d) and 54 of the Complaint, and, therefore, deny the same and leave plaintiffs to their proof thereof.

45. Defendants deny the allegations contained in paragraph numbered 55 of the Complaint.

46. Defendants deny the allegations contained in paragraph numbered 8 and 56 of the Complaint, except that on information and belief Defendant believes that the plaintiffs MARCEL BOUCHER and JEANNE BOUCHER d/b/a MARCEL BOUCHER ET CIE., manufactured and sold reproductions of articles of ladies costume jewelry mentioned in said paragraph 8.

47. Answering paragraph 9(a) and 56 of the Complaint herein, defendants deny that the jewelry pieces mentioned in paragraphs numbered 8 of the Complaint are works of art of artistic craftsmanship conceived as wholly original with the alleged author thereof and constitute copyrightable subject matter under the laws of the United States; that plaintiffs secured copyrights for the same by first publishing the same in the United States on or about January 2, 1955, by selling copies thereof, each said copy having the required copyright notice affixed thereto. Defendant has no knowledge or information sufficient to form a belief as to the allegations that prior to June 14, 1954, plaintiff, MARCEL BOUCHER d/b/a BOUCHER duly licensed MARCEL BOUCHER and JEANNE BOUCHER d/b/a MARCEL BOUCHER ET CIE., to manufacture and sell reproductions of all of

the said alleged works of art and to use the alleged copyrights thereof set forth in said paragraph 9, and, therefore, deny the same and leave plaintiffs to their proof thereof.

[417] (b) Defendants deny the allegations contained in paragraphs numbered 9(b) and 56 of the Complaint, except that defendants admit that there were issued by the Copyright Office Certificates of Registration of Claims to Copyright identified in said paragraph 9(b), but denies that said Certificates of Registration were legally issued or are valid, or secured to plaintiffs or either of them any copyrights in said works or any right to sue for copyright infringement.

(c) Defendants deny the allegations contained in paragraphs numbered 9(c) and 56 of the Complaint, except that defendants are informed that plaintiffs, MARCEL BOUCHER and JEANNE BOUCHER d/b/a MARCEL BOUCHER ET CIE., have sold reproductions of articles of costume jewelry mentioned in paragraph numbered 8 of the Complaint.

(d) Defendants have no knowledge or information sufficient to form a belief as to the allegations contained in paragraph numbered 9(d) and 56 of the Complaint, and, therefore, deny the same and leave plaintiffs to their proof thereof.

48. Defendant denies the allegations contained in paragraph numbered 57 of the Complaint.

49. Defendant denies the allegations contained in paragraph numbered 11 and 58 of the Complaint.

50. Defendants admit that the plaintiffs MARCEL BOUCHER and JEANNE BOUCHER d/b/a MARCEL BOUCHER ET CIE., have reproduced the alleged works of art for sale as ladies costume jewelry and have sold the same, but has no knowledge or information sufficient

to form a belief that they have been sold by the plaintiffs herein in substantial quantities to the public since the dates of alleged publication of each of said alleged works of art, [418] and that the plaintiffs will continue to offer such costume jewelry for sale, and, therefore deny the same and leave plaintiffs to their proof thereof.

51. Defendants deny the allegations contained in paragraph numbered 13 and 58 of the Complaint, and specifically denies infringement of any of the alleged copyrights of the plaintiffs.

52. Defendants have no knowledge or information sufficient to form a belief as to the allegations contained in paragraph 14 and 58 of the Complaint, and, therefore, deny the same and leave the plaintiffs to their proofs thereof.

53. Defendant denies the allegations contained in paragraph numbered 59 of the Complaint.

54. Defendants deny the allegations contained in paragraphs numbered 60 of the Complaint.

55 Defendants deny the allegations contained in paragraph numbered 61 of the Complaint.

56. Defendants deny the allegations and statements contained and made by the plaintiffs in paragraphs numbered 18 and 62 of the Complaint.

57. Defendant repeats and reasserts the eleven specific defenses set forth in this Answer and Counterclaim.

The defendant, VOLUPTE, INC., for answer to the Sixth Cause of Action alleged in the Complaint, states:

58. Defendant admits that this is an action for alleged copyright infringement arising under Title 17, United States [419] Code and that jurisdiction of this Court is founded upon Title 28, United States

Code, Section 1338, and otherwise denies the allegations contained in paragraphs numbered 1 and 63 of the Complaint.

59. Defendant admits the allegations contained in paragraphs numbered 2 and 63 of the Complaint.

60. Defendant has no knowledge or information sufficient to form a belief as to the allegations contained in paragraphs numbered 3 and 63 of the Complaint, and, therefore, denies the same and leaves plaintiffs to their proof thereof.

61. Defendant admits the allegations of paragraph numbered 64 of the Complaint.

62. Defendant denies the allegations contained in paragraphs numbered 5 and 64 of the Complaint, except that on information defendant believes that plaintiffs, MARCEL BOUCHER and JEANNE BOUCHER d/b/a MARCEL BOUCHER ET CIE., manufactured and sold reproductions of articles of ladies costume jewelry mentioned in said paragraph 5.

63. (a) Answering paragraph 6(a) and 65 of the Complaint herein, said defendant denies that the jewelry pieces mentioned in paragraph numbered 5 of the Complaint are works of artistic craftsmanship conceived as wholly original with the alleged author thereof and constitute copyrightable subject matter under the laws of the United States; that plaintiffs secured copyrights for the same by first publishing the same in the United States on or about June 14, 1954, by selling copies thereof, each said copy having the required copyright notice affixed thereto. Defendant has no knowledge or information sufficient [420] to form a belief as to the allegations that prior to June 14, 1954, plaintiff, MARCEL BOUCHER d/b/a BOUCHER duly licensed MARCEL BOUCHER and JEANNE BOUCHER d/b/a MARCEL BOUCHER ET CIE.,

to manufacture and sell reproductions of all of the said alleged works of art and to use the alleged copyrights thereof set forth in said paragraph 6, and, therefore, denies the same and leaves plaintiffs to their proof thereof.

(b) Defendant denies the allegations contained in paragraph numbered 6(b) and 65 of the Complaint, except that defendant admits that there were issued by the Copyright Office Certificates of Registration of Claims to Copyright identified in said paragraph 6 (b), but denies that said Certificates of Registration were legally issued or are valid, or secured to plaintiffs or either of them any copyrights in said works or any right to sue for copyright infringement.

(c) Defendant denies the allegations contained in paragraph numbered 6(c) and 65 of the Complaint, except that defendant is informed that the plaintiff, MARCEL BOUCHER and JEANNE BOUCHER d/b/a MARCEL BOUCHER ET CIE., have sold reproductions of articles of costume jewelry mentioned in paragraph numbered 5 of the Complaint.

(d) Defendant has no knowledge or information sufficient to form a belief as to the allegations contained in paragraph numbered 6(d) and 65 of the Complaint, and, therefore, denies the same and leaves plaintiffs to their proof thereof.

64. Defendant denies the allegations contained in paragraph numbered 66 of the Complaint.

65. Defendant denies the allegations contained in paragraph numbered 67 of the Complaint, except that on information and belief defendant believes that the plaintiffs MARCEL BOUCHER and [421] JEANNE BOUCHER d/b/a MARCEL BOUCHER ET CIE., manufactured and sold reproductions of articles of ladies costume jewelry mentioned

in said paragraph 8.

66. Answering paragraphs 9(a) and 67 of the Complaint herein, defendant denies that the jewelry pieces mentioned in paragraph numbered 8 of the Complaint are works of art of artistic craftsmanship conceived as wholly originally with the alleged author thereof and constitute copyrightable subject matter under the laws of the United States; that plaintiffs secured copyrights for the same by first publishing the same in the United States on or about January 2, 1955, by selling copies thereof, each said copy having the required copyright notice affixed thereto. Defendant has no knowledge or information sufficient to form a belief as to the allegations that prior to June 14, 1954, plaintiff, MARCEL BOUCHER d/b/a BOUCHER duly licensed MARCEL BOUCHER and JEANNE BOUCHER d/b/a MARCEL BOUCHER ET CIE., to manufacture and sell reproductions of all of the said alleged works of art and to use the alleged copyrights thereof set forth in said paragraph 9, and, therefore, denies the same and leaves plaintiffs to their proof thereof.

(b) Defendant denies the allegations contained in paragraphs numbered 9(b) and 67 of the Complaint, except that defendant admits that there were issued by the Copyright Office Certificates of Registration of Claims to Copyright identified in said paragraph 9(b), but denies that said Certificates of Registration were legally issued or are valid, or secured to plaintiffs or either of them any copyrights in said works or any right to sue for copyright infringement.

[422] (c) Defendant denies the allegations contained in paragraphs numbered 9(c) and 67 of the Complaint, except that defendant is informed that plaintiffs, MARCEL BOUCHER and JEANNE BOUCHER d/b/a MARCEL BOUCHER ET CIE., have sold reproductions

of articles of costume jewelry mentioned in paragraph numbered 8 of the Complaint.

(d) Defendant has no knowledge or information sufficient to form a belief as to the allegations contained in paragraphs numbered 9(d) and 67 of the Complaint, and, therefore, denies the same and leaves plaintiffs to their proof thereof.

67. Defendant denies the allegations contained in paragraph numbered 68 of the Complaint.

68. Defendant denies the allegations contained in paragraphs numbered 11 and 69 of the Complaint.

69. Defendant admits that the plaintiffs, MARCEL BOUCHER and JEANNE BOUCHER d/b/a MARCEL BOUCHER ET CIE., have reproduced the alleged works of art for sale as ladies costume jewelry and have sold the same, but has no knowledge or information sufficient to form a belief that they have been sold by the plaintiffs herein in substantial quantities to the public since the dates of alleged publication of each of said alleged works of art, and that the plaintiffs will continue to offer such costume jewelry for sale, and, therefore denies the same and leaves plaintiffs to their proof thereof.

70. Defendant denies the allegations contained in paragraphs numbered 13 and 69 of the Complaint, and specifically denies infringement of any of the alleged copyrights of the plaintiffs.

[423] 71. Defendant has no knowledge or information sufficient to form a belief as to the allegations contained in paragraphs 14 and 69 of the Complaint, and, therefore, denies the same and leaves the plaintiffs to their proofs thereof.

72. Defendant denies the allegations contained in paragraph numbered 70 of the Complaint.

73. Defendant denies the allegations contained in paragraph numbered 71 of the Complaint.

74. Defendant denies the allegations contained in paragraph numbered 72 of the Complaint.

75. Defendant denies the allegations and statements contained and made by the plaintiffs in paragraph numbered 18 and 73 of the Complaint.

76. Defendant repeats and reasserts the eleven specific defenses set forth in this Answer and Counterclaim.

The defendant, WALTER HEIMLER, INC., for answer to the Seventh Cause of Action alleged in the Complaint, states:

77. Defendant admits that this is an action for alleged copyright infringement arising under Title 17, United States Code and that jurisdiction of this Court is founded upon Title 28, United States Code, Section 1338, and otherwise denies the allegations contained in paragraphs numbered 1 and 74 of the Complaint.

78. Defendant admits the allegations contained in paragraphs numbered 2 and 74 of the Complaint.

[424] 79. Defendant has no knowledge or information sufficient to form a belief as to the allegations contained in paragraphs numbered 3 and 74 of the Complaint, and, therefore, denies the same and leaves plaintiffs to their proof thereof.

80. Defendant admits the allegations of paragraph numbered 75 of the Complaint.

81. Defendant denies the allegations contained in paragraphs numbered 5 and 76 of the Complaint, except that on information defendant believes that plaintiffs, MARCEL BOUCHER and JEANNE BOUCHER d/b/a MARCEL BOUCHER ET CIE., manufactured

and sold reproductions of articles of ladies costume jewelry mentioned in said paragraph 5.

82. (a) Answering paragraph 6(a) and 76 of the Complaint herein, said defendant denies that the jewelry pieces mentioned in paragraph numbered 5 of the Complaint are works of artistic craftsmanship conceived as wholly original with the alleged author thereof and constitute copyrightable subject matter under the laws of the United States; that plaintiffs secured copyrights for the same by first publishing the same in the United States on or about June 14,1954, by selling copies thereof, each said copy having the required copyright notice affixed thereto. Defendant has no knowledge or information sufficient to form a belief as to the allegations that prior to June 14, 1954, plaintiff, MARCEL BOUCHER d/b/a BOUCHER duly licensed MARCEL BOUCHER and JEANNE BOUCHER d/b/a MARCEL BOUCHER ET CIE., to manufacture and sell reproductions of all of the said alleged works of art and to use the alleged copyrights thereof set forth in said paragraph 6, and, therefore, denies the same and leaves plaintiffs to their proof thereof.

(b) Defendant denies the allegations contained in [425] paragraphs numbered 6(b) and 76 of the Complaint, except that defendant admits that there were issued by the Copyright Office Certificates of Registration of Claims to Copyright identified in said paragraph 6 (b), but denies that said Certificates of Registration were legally issued or are valid, or secured to plaintiffs or either of them any copyrights in said works or any right to sue for copyright infringement.

(c) Defendant denies the allegations contained in paragraphs numbered 6(c) and 76 of the Complaint, except that defendant is informed that the plaintiff, MARCEL BOUCHER and JEANNE

BOUCHER d/b/a MARCEL BOUCHER ET CIE., have sold reproductions of articles of costume jewelry mentioned in paragraph numbered 5 of the Complaint.

(d) Defendant has no knowledge or information sufficient to form a belief as to the allegations contained in paragraphs numbered 6(d) and 76 of the Complaint, and, therefore, denies the same and leaves plaintiffs to their proof thereof.

83. Defendant denies the allegations contained in paragraph numbered 77 of the Complaint.

84. Defendant denies the allegations contained in paragraphs numbered 8 and 78 of the Complaint, except that on information and belief defendant believes that the plaintiffs, MARCEL BOUCHER and JEANNE BOUCHER d/b/a MARCEL BOUCHER ET CIE., manufactured and sold reproductions of articles of ladies costume jewelry mentioned in said paragraph 8.

85. Answering paragraphs 9(a) and 78 of the Complaint herein, defendant denies that the jewelry pieces mentioned in paragraph numbered 8 of the Complaint are works of art of artistic [426] craftsmanship conceived as wholly original with the alleged author thereof and constitute copyrightable subject matter under the laws of the United States; that plaintiffs secured copyrights for the same by first publishing the same in the United States on or about January 2, 1955, by selling copies thereof, each said copy having the required copyright notice affixed thereto. Defendant has no knowledge or information sufficient to form a belief as to the allegations that prior to June 14, 1954, plaintiff, MARCEL BOUCHER d/b/a BOUCHER duly licensed MARCEL BOUCHER and JEANNE BOUCHER d/b/a MARCEL BOUCHER ET CIE., to manufacture and sell reproductions of all of the said

alleged works of art and to use the alleged copyrights thereof set forth in said paragraph 9, and, therefore, denies the same and leaves plaintiffs to their proof thereof.

(b) Defendant denies the allegations contained in paragraphs numbered 9(b) and 78 of the Complaint, except that defendant admits that there were issued by the Copyright Office Certificates of Registration of Claims to Copyright identified in said paragraph 9 (b), but denies that said Certificates of Registration were legally issued or are valid, or secured to plaintiffs or either of them any copyrights in said works or any right to sue for copyright infringement.

(c) Defendant denies the allegations contained in paragraphs numbered 9(c) and 78 of the Complaint, except that defendant is informed that plaintiffs, MARCEL BOUCHER and JEANNE BOUCHER d/b/a MARCEL BOUCHER ET CIE., have sold reproductions of articles of costume jewelry mentioned in paragraph numbered 8 of the Complaint.

(d) Defendant has no knowledge or information sufficient to form a belief as to the allegations contained in paragraphs
[427]
numbered 9(d) and 78 of the Complaint, and, therefore, denies the same and leaves plaintiffs to their proof thereof.

86. Defendant denies the allegations contained in paragraph numbered 79 of the Complaint.

87. Defendant denies the allegations contained in paragraphs numbered 11 and 80 of the Complaint.

88. Defendant admits that the plaintiffs, MARCEL BOUCHER and JEANNE BOUCHER d/b/a MARCEL BOUCHER ET CIE., have reproduced the alleged works of art for sale as ladies costume jewelry and have sold the same, but has no knowledge or

information sufficient to form a belief that they have been sold by the plaintiffs herein in substantial quantities to the public since the dates of alleged publication of each of said alleged works of art, and that the plaintiffs will continue to offer such costume jewelry for sale, and, therefore denies the same and leaves plaintiffs to their proof thereof.

89. Defendant denies the allegations contained in paragraphs numbered 13 and 80 of the Complaint,and specifically denies infringement of any of the alleged copyrights of the plaintiffs.

90. Defendant has no knowledge or information sufficient to form a belief as to the allegations contained in paragraphs 14 and 80 of the Complaint, and, therefore, denies the same and leaves the plaintiffs to their proofs thereof.

91. Defendant denies the allegations contained in paragraph numbered 81 of the Complaint.

[428] 92. Defendant denies the allegations contained in paragraph numbered 82 of the Complaint.

93. Defendant denies the allegations contained in paragraph numbered 83 of the Complaint.

94. Defendant denies the allegations and statements contained and made by the plaintiffs in paragraphs numbered 18 and 84 of the Complaint.

95. Defendant repeats and reasserts the Eleven specific defenses set forth in this Answer and Counterclaim.

COUNTERCLAIM

The defendants, CAPRI JEWELRY, INC., D. LISNER & CO. INC., (sued as Sidney Lisner d/b/a D. Lisner & Co.), JULES STEINBERG, MORRIS KIMMELMAN, HYMAN SLOVITT, ABRAHAM J. SLOVITT and SAMUEL FRIEDMAN, (sued as JULES STEINBERG and I. SLOVIT),

d/b/a B. STEINBERG-KASLO CO., VOLUPTE, INC., and WALTER HEIMLER, INC., as and for their Counterclaim allege as follows:

96. This Counterclaim is predicated upon the Declaratory Judgment Act (28 U.S.C., Sec. 2201) and upon Rule 13, Subdivisions (a) and (b) of the Federal Rules of Civil Procedure, and arises under the Copyright Law of the United States (Title 17, U.S.C.).

97. This Court has jurisdiction herein because the action sets forth an actual controversy between the defendants, CAPRI JEWELRY, INC., D. LISNER & CO. INC., (sued as Sidney Lisner d/b/a D. Lisner & Company), JULES STEINBERG, MORRIS KIMMELMAN, HYMAN SLOVITT, ABRAHAM J. SLOVITT and SAMUEL FRIEDMAN, (sued as JULES STEINBERG and I. SLOVIT), d/b/a B. STEINBERG-KASLO CO., VOLUPTE, INC., and WALTER HEIMLER, INC., and the plaintiffs as to alleged infringements by said defendants of the alleged Copyrights mentioned in paragraphs numbered 6(b) and 9(b) of the Complaint herein, and further because this is a suit under the Copyright Law of the United States (Title 17, U.S.C.).

98. Upon information and belief, plaintiff, MARCEL BOUCHER, does business under the name and style of BOUCHER, and [429] has a regular and established place of business at 304 East 23rd Street, City of New York; and plaintiffs, MARCEL BOUCHER and JEANNE BOUCHER, are co-partners doing business under the firm name and style of MARCEL BOUCHER ET CIE., and have a regular and established place of business at 304 East 23rd Street, City of New York, and are engaged in the manufacture and sale of ladies costume jewelry.

99. Defendant, CAPRI JEWELRY, INC., is a domestic corporation having a regular and established place of business at 39

Fifth Avenue, City of New York, and is engaged in the ladies costume jewelry business.

100. Defendant, D. LISNER AND CO., INC., (sued as Sidney Lisner d/b/a D. Lisner & Company), is a domestic corporation having a regular and established place of business at 393 Fifth Avenue, City of New York, and is engaged in the ladies costume jewelry business.

101. Defendants JULES STEINBERG, MORRIS KIMMELMAN, HYMAN SLOVITT, ABRAHAM J. SLOVITT and SAMUEL FRIEDMAN, (sued as JULES STEINBERG and L SLOVITT), are co-partners doing business under the firm name and style of B. STEINBERG-KASLO CO., and have a regular and established place of business at 7 West 36th Street, City of New York, and are engaged in the manufacture and sale of ladies costume jewelry.

102. Defendant, VOLUPTE, INC., is a domestic corporation having a regular and established place of business at 393 Fifth Avenue, City of New York, and is engaged in the manufacture and sale of ladies costume jewelry.

[430] 103. Defendant WALTER HEIMLER, INC., is a domestic corporation having a regular and established place of business at 15 East 34th Street, City of New York, and is engaged in the ladies costume jewelry business.

104. That on or about July 7, 1955, plaintiffs commenced this suit charging said defendants with infringements of the alleged copyrights mentioned in paragraphs numbered 6(b) and 9(b) of the Complaint herein which infringements said defendants have denied and continue to deny and thereby raising an actual controversy.

105. Plaintiffs have asserted and claimed and still assert and claim that certain of said defendants' ladies costume jewelry are

and continue to be infringements of said Copyrights; the said defendants contend and assert that alleged rights of the plaintiffs under said alleged copyrights are not violated by the said defendants and the plaintiffs have no such right because said alleged copyrights, and each of them, are invalid, void and of no effect in law and in equity.

106. Plaintiffs have asserted and claimed and still assert and claim that said defendants have been publishing, manufacturing, selling and otherwise marketing copies of all of plaintiffs' alleged copyrighted works of art as described in the Complaint herein, and has been engaging in unfair trade practices and unfair competition against plaintiffs, all of which assertions and claims are false and untrue and are denied by the said defendants. The said defendants, on the contrary, contend and assert that the alleged rights of the plaintiffs have not been and are not violated by the said defendants and the plaintiffs have no such rights because the alleged copyrighted [431] works are not original or distinctive, are void, invalid and have no effect in law, and said defendants have not and are not engaging in unfair trade practices and unfair competition against plaintiffs.

107. Plaintiffs have asserted and claims that said defendants have purposely sought to trade on the alleged good will and reputation of MARCEL BOUCHER and MARCEL BOUCHER ET CIE., by advising their customers that the pieces of costume jewelry sold by it are identical copies of "BOUCHER" original pieces; and that said defendants have deliberately manufactured and sold their alleged copies of plaintiffs' alleged works of art with the intent and purpose to palm off the said copies as and for genuine and original works of art of the plaintiffs', which assertions and claims are false and untrue and known by the plaintiffs to be false and untrue, and are denied by the said

defendants.

108. Plaintiffs have no rights or privileges to prevent the manufacture and/or sale of ladies costume jewelry as are manufactured and/or sold by the said defendants, and plaintiffs have no right to assert any exclusive privileges as against said defendants and the customers of said defendants, because said alleged copyrights are not infringed by said defendants or their customers and is further invalid, void, not based on original works of art protectable under the copyright Law of the United States, and of no force or effect; and further because the said defendants have not committed any acts of unfair trade practices or unfair competition.

109. Plaintiffs said copyrights and each of them are invalid, void, have no legal effect, and are dedicated to the public because plaintiffs failed to publish the respective works alleged in the Complaint to be copyrighted and infringed, with [432] notice in the manner and form as required by Section 10 of Title 17, United States Code.

110. Plaintiffs said copyrights, and each of them are invalid, void, have no legal effect, and are dedicated to the public, because plaintiffs failed to comply with the form of notice prescribed by Section 19 of Title 17, United States Code, in force at the time of the publications of the works alleged to be copyrighted and infringed.

111. Plaintiffs said copyrights, and each of them are invalid, void, have no legal effect, and are dedicated to the public, because plaintiffs have failed to affix the notice of copyright to each copy or reproduction of the alleged copyrighted works published or offered for sale, as required by Section 10 of Title 17, United States Code.

112. Plaintiffs said copyrights, and each of them are invalid, void, have no legal effect, and are dedicated to the public, because

any intended notice carried by each of the works alleged to be infringed or reproductions thereof is incomplete in itself and not distinct or recognizable upon reasonable inspection as a notice of copyright, and does not appear on the face thereof as required by the Copyright Law.

113. Said defendants allege that the plaintiff, MARCEL BOUCHER, d/b/a BOUCHER, acquiesced in and authorized the publication of each of its said works by the other plaintiffs, MARCEL BOUCHER and JEANNE BOUCHER d/b/a MARCEL BOUCHER ET CIE., without the copyright notice as, or not in the form and/or manner required or prescribed by, the Copyright Laws of the United States, (Sections 10 and 18 of Title 17, U.S.C.) in force at the [433] time of the publications of said works, and copies or reproductions of the works complained about herein by the plaintiffs were sold to and appeared among retailers and others with the plaintiffs knowledge and consent without notice or without adequate notice, and said plaintiffs, MARCEL BOUCHER d/b/a BOUCHER, by such acquiescence and/or authorization dedicated the same to the public and waived any copyright protection thereof, and is now estopped to claim any rights therein.

114. Said defendants further allege that with respect to the works of ladies costume jewelry mentioned in paragraphs numbered 5 and 8 of the Complaint herein and alleged to be protected by the copyrights issued under the Certificates of Registration of Claims to Copyright mentioned and identified in paragraphs numbered 6(b) and 9(b) of the Complaint herein, the following works or costume jewelry pieces are different from those deposited in the Copyright Office as required under the Copyright Law and bear titles different from those stated and claimed in said Certificates of Registration, and, therefore, are not copyrighted thereunder and are now dedicated to the public. Any

alleged copyright notice or portion of copyright notice appearing on the following works or costume jewelry pieces is misleading, deceptive and legally ineffective. Plaintiffs have attempted to obtain copyright protection on more than one work in one registration and for only a single statutory registration fee.

The works or pieces of costume jewelry referred to in this paragraph are as follows:

Pin	Style No. 5859
Pin	Style No. 5860
Necklace	Style No. 5838
Pin	Style No. 5883
Pin	Style No. 5878
Pin	Style No. 5880
Earring	Style No. 5918
Pin	Style No. 5946
Pin	Style No. 5971
Pin	Style No. 5945
Pin	Style No. 5921
Earring	Style No. 5922

[434] 115. Said defendants further allege that with respect to the alleged copyrighted works or pieces of costume jewelry specifically mentioned in the foregoing paragraph numbered 114, the plaintiffs have not complied with the provision of Section 13, of Title 17, United States Code and the Rules and Regulations of the Copyright Office. The alleged copyrights have failed in their preservation and/or protection and have no legal effect because the plaintiffs failed to file after publication of said works or pieces of costume jewelry two copies of each thereof with the Register of Copyrights and/or to make application for a claim of copyright with the Register of Copyrights on each thereof and to accompany the same with the statutory registration fee, and, therefore, this action for infringement cannot be maintained.

116. Said defendants further allege that the works alleged to be copyrighted are not works of artistic craftsmanship or works of art protectable under the Copyright Laws and have not been originally

created, designed or conceived by the plaintiff MARCEL BOUCHER and said MARCEL BOUCHER is not the author of said works, and said material is not proper subjects of copyright.

117. The defendants, JULES STEINBERG, MORRIS KIMMELMAN, HYMAN SLIVITT, ABRAHAM J. SLOVITT and SAMUEL FRIEDMAN, (sued as JULES STEINBERG and I. SLOVIT), d/b/a B. STEINBERG-KASLO CO., are engaged in the business as manufacturers of costume jewelry, and sell the same to jobbers throughout the United States and are not engaged in the sale of costume jewelry directly to department stores and specialty shops or to the consumer; that said defendants in connection with the sale of their costume jewelry, have shown, offered for sale, and sold the costume jewelry under their own name, and at no time did said defendants [435] identify their costume jewelry in anywise, except as their own, and did not hold out, or represent to any of their customers, that said costume jewelry was the costume jewelry of plaintiffs'; the manufacture, offering and sale of defendants' costume jewelry, in no wise created any confusion in the trade, and that defendants did not intend to, nor did they deceive any person, firm or corporation dealing in costume jewelry, nor was any of the conduct of the defendants calculated to deceive, nor was the production of their costume jewelry, or the marketing thereof done in such a way that same was calculated to deceive, and did not in fact deceive buyers purchasing same; and at no time were defendants' costume jewelry palmed off as goods of plaintiffs or of any other manufacturer, and defendants have not appropriated the results of the industry or skill of plaintiffs, nor pirated upon the business of plaintiffs, nor engaged in any unfair competition with plaintiffs, as inferred by the complaint.

118. There is an actual controversy between the plaintiffs and the said defendants which is not only substantial but adverse in character; plaintiffs have the power and is actually seriously affecting and prejudicing the said defendants' rights; by bringing this suit plaintiffs have commenced a campaign of intimidation and threat and the defendants have been irreparably injured by diminution in their trade, loss of customers, and loss of prestige.

119. The plaintiffs, with full knowledge of the foregoing, and for the purpose of harassing said defendants and their customers and of damaging said defendants' businesses and reputation and preventing the sale of their ladies costume jewelry, have wrongfully commenced this suit and have wrongfully notified or caused to be notified the said defendants and many of their customers that the ladies costume jewelry sold by said defendants are infringements of plaintiffs' alleged copyrights, unfairly compete with and are copies of plaintiffs' "GOLD TEXTURE" line of ladies costume jewelry, which acts are calculated to cause and have caused great loss and damage to said defendants' businesses and said defendants' reputations in the trade, the exact amount of said losses and damage being unknown to the said defendants at the present time; and said defendants' pray an accounting to determine the same.

[436]

120. On information and belief plaintiffs will continue contending and notifying the trade that said defendants are copying its "GOLD TEXTURE" line of ladies costume jewelry and that said defendants infringing said alleged copyrights and unfairly competing with the plaintiffs to the great and inescapable damage of the said defendants unless restrained by this Court.

WHEREFORE, said defendants demand judgment:

1. Dismissing the Complaint herein.

2. That the Court declare and decree that the said defendants have not infringed on the copyrights mentioned in the Complaint or any of them.

3. That the Court declare and decree that the alleged copyrights mentioned in the Complaint are void, invalid, have no legal or equitable effect and are dedicated to the public.

4. That the Court declare and decree that the alleged copyrights mentioned in the Complaint have failed in their preservation and/or protection and have no legal effect.

[437] 5. That the Court declare and decree that the items or articles of ladies costume jewelry mentioned in the Eighth Defense and in paragraph numbered 114 of this Answer and Counterclaim are not protected, copyrighted or copyrightable under the said alleged copyrights.

6. That the Court declare and decree that the said defendants are not guilty of unfair trade practices and have not unfairly competed in any way with the plaintiffs.

7. That the Court declare and decree that the plaintiffs have been and are guilty of unfair trade practices and have been and are guilty of unfair competition as against the said defendants.

8. That preliminary and final injunctions enjoining and restraining plaintiffs, their agents, attorneys, employees, associates, devisees and confederates, from further asserting, contending, claiming or alleging that said defendants have or are infringing the said alleged copyrights or have or are unfairly competing with plaintiffs or are copying their "GOLD TEXTURE" line of costume jewelry; and from notifying the trade orally or in writing that defendants are

infringing and are unfairly competing with plaintiffs or that the defendants are copying plaintiffs' said "GOLD TEXTURE" line of costume jewelry and from threatening defendants' customers with suit.

9. That defendants be accorded an accounting of profits and damages arising from plaintiffs' unfair acts.

10. That defendants have judgment for their costs in this suit, an award of reasonable counsel fees and for such other and further relief as may seem proper.

/s/ Maxwell E. Sparrow
MAXWELL E. SPARROW
Attorney for Defendants named,
Office & P. O. Address,
535 Fifth Avenue,
Borough of Manhattan
City of New York

[441]

ANSWER AND COUNTERCLAIM

Now comes defendant DU BOYES, INC., for answer to the Complaint against it herein, states:

FIRST DEFENSE

The Complaint fails to state a claim against the said defendant upon which relief can be granted.

SECOND DEFENSE

The court lacks jurisdiction over the plaintiffs, MARCEL BOUCHER and JEANNE BOUCHER d/b/a MARCEL BOUCHER ET CIE.

THIRD DEFENSE

Plaintiffs failed to publish the respective works alleged in the Complaint to be copyrighted and infringed, with notice in the manner and form as required by Section 10 of Title 17, United States Code, and, therefore, each and every one of said alleged copyrights mentioned in the Complaint are void, invalid, have no legal effect and are dedicated to the public.

[442]

FOURTH DEFENSE

Plaintiffs failed to comply with the form of notice prescribed by Section 19, of Title 17, United States Code, in force at the time of the publications of the works alleged to be copyrighted and infringed, and, therefore, each and every one of said alleged copyrights mentioned in the Complaint herein are void, invalid, have no legal effect and are dedicated to the public.

FIFTH DEFENSE

Plaintiffs have failed to affix the notice of copyright to each copy or reproduction of the alleged copyrighted works published or offered for sale as required by Section 10 of Title 17, United States Code, and, therefore, each and every one of said alleged copyrights

are void, invalid, have no legal effect and are dedicated to the public.

SIXTH DEFENSE

Any intended notice carried by each of the works alleged to be infringed and reproduction thereof is incomplete in itself and not distinct or recognizable upon reasonable inspection as a notice of copyright, and does not appear on the face thereof as required by the Copyright Law.

SEVENTH DEFENSE

The plaintiff, MARCEL BOUCHER, d/b/a BOUCHER, acquiesced in and authorized the publication of each of its said works by the other plaintiff, MARCEL BOUCHER and JEANNE BOUCHER d/b/a MARCEL BOUCHER ET CIE, without the copyright notice as, or not in the form and/or manner required or prescribed by the Copyright Laws of the United States (Section 10 and 19 of Title 17, U.S.C.) in [443] force at the time of the publications of said works, and copies or reproductions of the works complained about herein by the plaintiffs were sold to and appeared among retailers and others with the plaintiffs knowledge and consent without notice or without adequate notice, and said plaintiff, MARCEL BOUCHER d/b/a BOUCHER, by such acquiescence and/or authorization dedicated the same to the public and waived any copyright protection thereof, and is now estopped to claim any rights therein.

EIGHTH DEFENSE

With respect to the works of ladies costume jewelry mentioned in paragraphs numbered 5 and 8 of the Complaint herein and alleged to be protected by the copyrights issued under the Certificates of Registration of Claims to Copyright mentioned and identified in paragraphs numbered 6(b) and 9(b) of the Complaint herein, the

following works or costume jewelry pieces are different from those deposited in the Copyright Office as required under the Copyright Law and bear titles different from those stated and claimed in said Certificates of Registration, and, therefore, are not copyrighted thereunder and are now dedicated to the public. Any alleged copyright notice or portion of copyright notice appearing on the following works or costume jewelry pieces is misleading, deceptive and legally ineffective. Plaintiffs have attempted to obtain copyright protection on more than one work in one registration and for only a single statutory registration fee.

The works or pieces of costume jewelry referred to in this Eighth Defense are as follows:

[444]

Pin--	Style No. 5859
Pin--	Style No. 5860
Necklace--	Style No. 5838
Pin--	Style No. 5883
Pin--	Style No. 5878
Pin--	Style No. 5880
Earring--	Style No. 5918
Pin--	Style No. 5946
Pin--	Style No. 5971
Pin--	Style No. 5945
Pin--	Style No. 5921
Earring--	Style No. 5922

NINTH DEFENSE

With respect to the alleged copyrighted works or pieces of costume jewelry specifically mentioned in the foregoing Eighth Defense, the plaintiffs have not complied with the provisions of Section 13 of

Title 17, United States Code and the Rules and Regulations of the Copyright Office. The alleged copyrights have failed in their preservation and/or protection and have no legal effect because the plaintiffs failed to file after publication of said works or pieces of costume jewelry two copies of each thereof with the Register of Copyrights and/or to make applications for a claim of copyright with the Register of Copyrights on each thereof and to accompany the same with the statutory registration fee, and, therefore, this action for infringement cannot be maintained.

TENTH DEFENSE

The Works alleged to be copyrighted are not works of artistic craftsmanship or works of art protectable under the Copyright Laws and have not been originally created, designed or [445] conceived by the plaintiff MARCEL BOUCHER, and said MARCEL BOUCHER is not the author of said works, and said material is not proper subjects of copyright.

ELEVENTH DEFENSE

Plaintiffs are in Court with unclean hands because they have designated and sold and are continuing to designate and sell copies or reproductions of the said works allegedly copyrighted under the misleading and deceptive name and description "GOLD TEXTURE", when in truth and in fact the said copies or reproductions of the said works of ladies costume jewelry are not made of gold. The public is thus led to believe that it is purchasing items made of gold.

The Defendant, DU BOYES, INC., for answer to the First Cause of Action alleged in the Complaint, states:

1. Defendant admits that this is an action for alleged copyright infringement arising under Title 17, United States Code and

that jurisdiction of this Court is founded upon Title 28, United States Code, Section 1338, and otherwise denies the allegations contained in paragraph numbered 1 of the Complaint.

2. Defendant admits the allegations contained in paragraph numbered 2 of the Complaint.

3. Defendant has no knowledge or information sufficient to form a belief as to the allegations contained in paragraph numbered 3 of the Complaint, and, therefore, denies the same and leaves plaintiffs to their proof thereof.

4. Defendant admits the allegations of paragraph numbered 4 of the Complaint.

[446] 5. Defendant denies the allegations contained in paragraph numbered 5 of the Complaint, except that on information defendant believes that plaintiffs, MARCEL BOUCHER and JEANNE BOUCHER d/b/a MARCEL BOUCHER ET CIE., manufactured and sold reproductions of articles of ladies costume jewelry mentioned in said paragraph 5.

6. (a) Answering paragraph 6(a) of the Complaint herein, said Defendant denies that the jewelry pieces mentioned in paragraph numbered 5 of the Complaint are works of artistic craftsmanship conceived as wholly original with the alleged author thereof and constitute copyrightable subject matter under the laws of the United States; that plaintiffs secured copyrights for the same by first publishing the same in the United States on or about June 14, 1954, by selling copies thereof, each said copy having the required copyright notice affixed thereto. Defendant has no knowledge or information sufficient to form a belief as to the allegations that prior to June 14, 1954, plaintiff, MARCEL BOUCHER d/b/a BOUCHER duly licensed MARCEL

BOUCHER and JEANNE BOUCHER d/b/a MARCEL BOUCHER ET CIE., to manufacture and sell reproductions of all of the said alleged works of art and to use the alleged copyrights thereof set forth in said paragraph 6, and, therefore, denies the same and leaves plaintiffs to their proof thereof.

(b) Defendant denies the allegations contained in paragraph numbered 6(b) of the Complaint, except that defendant admits that there were issued by the Copyright Office Certificates of Registration of Claims to Copyright identified in said paragraph 6(b), but denies that said Certificates of Registration were legally issued or are valid, or secured to plaintiffs or either of them any copyrights in said works or any right to sue [447] for copyright infringement.

(c) Defendant denies the allegations contained in paragraph numbered 6(c) of the complaint, except that defendant is informed that the plaintiff, MARCEL BOUCHER and JEANNE BOUCHER d/b/a MARCEL BOUCHER ET CIE., have sold reproductions of the articles of costume jewelry mentioned in paragraph numbered 5 of the Complaint.

(d) Defendant has no knowledge or information sufficient to form a belief as to the allegations contained in paragraphs numbered 6(d) of the Complaint, and, therefore, denies the same and leave plaintiffs to their proof thereof.

7. Defendant denies the allegations contained in paragraph numbered 7 of the Complaint.

8. Defendant denies the allegations contained in paragraph numbered 8 of the Complaint, except that on information and belief defendant believes that the plaintiffs MARCEL BOUCHER and JEANNE BOUCHER d/b/a MARCEL BOUCHER ET CIE., manufactured and sold reproductions of articles of ladies costume jewelry mentioned

in said paragraph 8.

9. Answering paragraph 9(a) of the Complaint herein, defendant denies that the jewelry pieces mentioned in paragraph numbered 8 of the Complaint are works of art of artistic craftsmanship conceived as wholly original with the alleged author thereof and constitute copyrightable subject matter under the laws of the United States; that plaintiffs secured copyrights for the same by first publishing the same in the United States on or about January 2, 1955, by selling copies thereof, each said copy having the required copyright notice affixed thereto. Defendant has no knowledge or information [448] sufficient to form a belief as to the allegations that prior to June 14, 1954, plaintiff, MARCEL BOUCHER d/b/a BOUCHER duly licensed MARCEL BOUCHER and JEANNE BOUCHER d/b/a MARCEL BOUCHER ET CIE., to manufacture and sell reproductions of all the said alleged works of art and to use the alleged copyrights thereof set forth in said paragraph 9, and. therefore, denies the same and leaves plaintiffs to their proof thereof.

(b) Defendant denies the allegations contained in paragraph numbered 9(b) of the Complaint, except that defendant admits that there were issued by the Copyright Office Certificates of Registration of Claims to Copyright identified in said paragraph 9(b), but denies that said Certificates of Registration were legally issued or are valid, or secured to plaintiffs or either of them any copyrights in said works or any right to sue for copyright infringement.

(c) Defendant denies the allegations contained in paragraph numbered 9(c) of the Complaint, except that defendant is informed that plaintiffs, MARCEL BOUCHER and JEANNE BOUCHER d/b/a MARCEL BOUCHER ET CIE., have sold reproductions of

articles of costume jewelry mentioned in paragraph numbered 8 of the Complaint.

(d) Defendant has no knowledge or information sufficient to form a belief as to the allegations contained in paragraph numbered 9(d) of the Complaint, and, therefore, denies the same and leaves plaintiffs to their proof thereof.

10. Defendant denies the allegations contained in paragraph numbered 10 of the Complaint.

11. Defendant denies the allegations contained in paragraph numbered 11 of the Complaint.

[449] 12. Defendant admits as alleged in paragraph numbered 12 of the Complaint, that the plaintiffs, MARCEL BOUCHER and JEANNE BOUCHER d/b/a MARCEL BOUCHER ET CIE., have reproduced the alleged works of art for sale as ladies costume jewelry and have sold the same,but has no knowledge or information sufficient to form a belief that they have been sold by the plaintiffs herein in substantial quantities to the public since the dates of alleged publication of each of said alleged works of art, and that the plaintiffs will continue to offer such costume jewelry for sale, and therefore denies the same and leaves plaintiffs to their proof thereof.

13. Defendant denies the allegations contained in paragraph numbered 13 of the Complaint, and specifically denies infringement of any of the alleged copyrights of the plaintiffs.

14. Defendant has no knowledge or information sufficient to form a belief as to the allegations contained in paragraph numbered 14 of the Complaint, and, therefore, denies the same and leaves the plaintiffs to their proofs thereof.

15. Defendant denies the allegations contained in paragraph numbered 15 of the Complaint.

16. Defendant denies the allegations contained in paragraph numbered 16 of the Complaint.

17. Defendant denies the allegations contained in paragraph numbered 17 of the Complaint.

18. Defendant denies the allegations and statements contained and made by the plaintiffs in paragraph numbered 18 of the Complaint.

19. Defendant repeats and reasserts the eleven specific defenses set forth in this Answer and Counterclaim.

[450] COUNTERCLAIM

The defendant DU BOYES, INC., as and for its Counterclaim alleges as follows:

20. This Counterclaim is predicated upon the Declaratory Judgment Act (28 U.S.C. Sec. 2201) and upon Rule 13, Subdivisions (a) and (b) of the Federal Rules of Civil Procedure, and arises under the Copyright Law of the United States (Title 17, U.S.C.).

21. This Court has jurisdiction herein because the action sets forth an actual controversy between the defendant, DU BOYES, INC., and the plaintiffs as to alleged infringements by said defendant of the alleged Copyrights mentioned in paragraphs numbered 6(b) and 9(b) of the Complaint herein, and further because this is a suit under the Copyright Law of the United States (Title 17, U.S.C.).

22. Upon information and belief, plaintiff, MARCEL BOUCHER, does business under the name and style of BOUCHER, and has a regular and established place of business at 304 East 23rd Street, City of New York; and plaintiffs, MARCEL BOUCHER and JEANNE BOUCHER, are co-partners doing business under the firm

name and style of MARCEL BOUCHER ET CIE., and have a regular and established place of business at 304 East 23rd Street, City of New York, and are engaged in the manufacture and sale of ladies costume jewelry.

23. Defendant, DU BOYES, INC., is a domestic corporation having a regular and established place of business at 14 East 38th Street, City of New York, and is engaged in the ladies costume jewelry business.

[451] 24. That on or about July 7, 1955, plaintiffs commenced this suit charging said defendant with infringements of the alleged copyrights mentioned in paragraphs numbered 6(b) and 9(b) of the Complaint herein which infringements said defendant has denied and continue to deny and thereby raising an actual controversy.

25. Plaintiffs have asserted and claimed and still assert and claim that certain of said defendant's ladies costume jewelry are and continue to be infringements of said Copyrights; the said defendant contends and asserts that alleged rights of the plaintiffs under said alleged copyrights are not violated by the said defendant and the plaintiffs have no such right because said alleged copyrights, and each of them, are invalid, void and of no effect in law and in equity.

26. Plaintiffs have asserted and claimed and still assert and claim that said defendant has been publishing, manufacturing, selling and otherwise marketing copies of all of plaintiffs' alleged copyrighted works of art as described in the Complaint herein, and has been engaging in unfair trade practices and unfair competition against plaintiffs, all of which assertions and claims are false and untrue and are denied by the said defendant. The said defendant, on the contrary, contends and asserts that the alleged rights of the plaintiffs have not

been and are not violated by the said defendant and the plaintiffs have no such rights because the alleged copyrighted works are not original or distinctive, are void, invalid and have no effect in law, and said defendant has not and is not engaging in unfair trade practices and unfair competition against plaintiffs.

[452] 27. Plaintiffs have asserted and claim that said defendant has purposely sought to trade on the alleged good will and reputation of MARCEL BOUCHER and MARCEL BOUCHER ET CIE., by advising its customers that the pieces of costume jewelry sold by it are identical copies of "BOUCHER" original pieces; and that said defendant has deliberately manufactured and sold its alleged copies of plaintiffs' alleged works of art with the intent and purpose to palm off the said copies as and for genuine and original works of art of the plaintiffs', which assertions and claims are false and untrue and known by the plaintiffs to be false and untrue, and are denied by the said defendant.

28. Plaintiffs have no rights or privileges to prevent the manufacture and/or sale of ladies costume jewelry as are manufactured and/or sold by the said defendant, and plaintiffs have no right to assert any exclusive privileges as against said defendant and the customers of said defendant, because said alleged copyrights are not infringed by said defendant or its customers and is further invalid, void, not based on original works of art protectable under the copyright Law of the United States, and of nor force or effect; and further because the said defendant has not committed any acts of unfair trade practices or unfair competition.

29. Plaintiffs said copyrights and each of them are invalid, void, have no legal effect, and are dedicated to the public because plaintiffs failed to publish the respective works alleged in the

Complaint to be copyrighted and infringed, with notice in the manner and form as required by Section 10 of Title 17, United States Code.

[453] 30. Plaintiffs said copyrights and each of them are invalid, void, have no legal effect, and are dedicated to the public, because plaintiffs failed to comply with the form of notice prescribed by Section 19 of Title 17, United States Code, in force at the time of the publications of the works alleged to be copyrighted and infringed.

31. Plaintiffs' said copyrights, and each of them are invalid, void, have no legal effect, and are dedicated to the public, because plaintiffs have failed to affix the notice of copyright to each copy or reproduction of the alleged copyrighted works published or offered for sale, as required by Section 10 of Title 17, United States Code.

32. Plaintiffs' said copyrights, and each of them are invalid, void, have no legal effect, and are dedicated to the public, because any intended notice carried by each of the works alleged to be infringed or reproductions thereof is incomplete in itself and not distinct or recognizable upon reasonable inspection as a notice of copyright, and does not appear on the face thereof as required by the Copyright Law.

33. Said defendants allege that the plaintiff, MARCEL BOUCHER, d/b/a BOUCHER, acquiesced in and authorized the publication of each of its said works by the other plaintiffs, MARCEL BOUCHER and JEANNE BOUCHER d/b/a MARCEL BOUCHER ET CIE., without the copyright notice as, or not in the form and/or manner required or prescribed by, the Copyright Laws of the United States (Sections 10 and 19 of Title 17, U.S.C.) in force at the time of the publications of said works, and copies or reproductions of the

works complained about herein by the plaintiffs were sold to and appeared among [454] retailers and others with the plaintiffs' knowledge and consent without notice or without adequate notice, and said plaintiffs, MARCEL BOUCHER d/b/a BOUCHER, by such acquiescence and/or authorization dedicated the same to the public and waived any copyright protection thereof, and is now estopped to claim any rights therein.

34. Said defendant further alleges that with respect to the works of ladies costume jewelry mentioned in paragraphs numbered 5 and 8 of the Complaint herein and alleged to be protected by the copyrights issued under the Certificates of Registration of Claims to Copyright mentioned and identified in paragraphs numbered 6(b) and 9(b) of the Complaint herein, the following works or costume jewelry pieces are different from those deposited in the Copyright Office as required under the Copyright Law and bear titles different from those stated and claimed in said Certificates of Registration, and, therefore, are not copyrighted thereunder and are now dedicated to the public. Any alleged copyright notice or portion of copyright notice appearing on the following works or costume jewelry pieces is misleading, deceptive and legally ineffective. Plaintiffs have attempted to obtain copyright protection on more than one work in one registration and for only a single statutory registration fee.

The works or pieces of costume jewelry referred to in this paragraph are as follows:

Pin	Style No. 5859
Pin	Style No. 5860
Necklace	Style No. 5838
Pin	Style No. 5883
Pin	Style No. 5878
Pin	Style No. 5880
Earring	Style No. 5918

Pin	Style No. 5946
Pin	Style No. 5971
Pin	Style No. 5945
Pin	Style No. 5921
Earring	Style No. 5922

[455] 35. Said defendant further alleges that with respect to the alleged copyrighted works or pieces of costume jewelry specifically mentioned in the foregoing paragraph numbered 34, the plaintiffs have not complied with the provision of Section 13, of Title 17, United States Code and the Rules and Regulations of the Copyright Office. The alleged copyrights have failed in their preservation and/or protection and have no legal effect because the plaintiffs failed to file after publication of said works or pieces of costume jewelry two copies of each thereof with the Register of Copyrights and/or to make application for a claim of copyright with the Register of Copyrights on each thereof and to accompany the same with the statutory registration fee, and, therefore, this action for infringement cannot be maintained.

36. Said defendant further alleges that the works alleged to be copyrighted are not works of artistic craftsmanship or works of art protectable under the Copyright Laws and have not been originally created, designed or conceived by the plaintiff MARCEL BOUCHER, and said MARCEL BOUCHER is not the author of said works, and said material is not proper subjects of copyright.

37. There is an actual controversy between the plaintiffs and the said defendant which is not only substantial but adverse in character; plaintiffs have the power and is actually seriously affecting and prejudicing the said defendant's rights; by bringing this suit plaintiffs have commenced a campaign of intimidation and threat and the said defendant has been irreparably injured by diminution in its trade,

loss of customers, and loss of prestige.

38. The plaintiffs, with full knowledge of the foregoing, and for the purpose of harassing said defendant and its customers
[456]
and of damaging said defendant's business and reputation and preventing the sale of its ladies costume jewelry, have wrongfully commenced this suit and have wrongfully notified or caused to be notified the said defendant and many of its customers that the ladies costume jewelry sold by said defendant are infringements of plaintiffs' alleged copyrights, unfairly compete with and are copies of plaintiffs' "GOLD TEXTURE" line of ladies costume jewelry, which acts are calculated to cause and have caused great loss and damage to said defendant's business and said defendant's reputation in the trade, the exact amount of said loss and damage being unknown to the said defendant at the present time; and said defendant prays an accounting to determine the same.

39. On information and belief plaintiffs will continue contending and notifying the trade that said defendant is copying its "GOLD TEXTURE" line of ladies costume jewelry and that said defendant is infringing said alleged copyrights and unfairly competing with the plaintiffs to the great and inescapably damage of the said defendant unless restrained by this Court.

WHEREFORE, said defendant demands judgment:

1. Dismissing the Complaint herein.

2. That the Court declare and decree that the said defendant has not infringed on the copyrights mentioned in the Complaint or any of them.

3. That the Court declare and decree that the alleged copyrights mentioned in the Complaint are void, invalid, have no legal

or equitable effect and are dedicated to the public.

4. That the Court declare and decree that the alleged copyrights mentioned in the Complaint have failed in their preservation and/or protection and have no legal effect.

[457] 5. That the Court declare and decree that the items or articles of ladies costume jewelry mentioned in the Eighth Defense and in paragraph numbered 34 of this Answer and Counterclaim are not protected, copyrighted or copyrightable under the said alleged copyrights.

6. That the Court declare and decree that the said defendant is not guilty of unfair trade practice and has not unfairly competed in any way with the plaintiffs.

7. That the Court declare and decree that the plaintiffs have been and are guilty of unfair competition as against the said defendant.

8. That preliminary and final injunctions enjoining and restraining plaintiffs, their agents, attorneys, employees, associates, devisees and confederates, from further asserting, contending, claiming or alleging that said defendant has or is infringing the said alleged copyrights or has or is unfairly competing with plaintiffs or is copying their "GOLD TEXTURE" line of costume jewelry; and from notifying the trade orally or in writing that said defendant is infringing and is unfairly competing with plaintiffs or that the said defendant is copying plaintiffs' said "GOLD TEXTURE" line of costume jewelry and from threatening said defendant's customers with suit.

9. That said defendant be accorded an accounting of profits and damages arising from plaintiffs' unfair acts.

10. That said defendant have judgment for its costs in

this suit, an award of reasonable counsel fees and for such other and further relief as may seem proper.

/s/ Maxwell E. Sparrow

MAXWELL E. SPARROW
Attorney for Defendant
DU BOIS INC.,
Office & P.O. Address,
535 Fifth Avenue
Borough of Manhattan
City of New York

[460] ANSWER OF DEFENDANT ARKE, INC.

The defendant, ARKE, INC., for answer to the second cause of action alleged in the complaint herein states:

1. Defendant ARKE, INC. admits that this is an action for alleged copyright infringement under Title 17 of the United States Code in that jurisdiction is unfounded upon Title 28 United States Code Section 1338 and except as so admitted denies the remaining allegations of paragraph "1" of the complaint.

2. Defendant ARKE, INC. is without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraphs "2" and "3" of the complaint.

[461] 3. Defendant ARKE, INC. admits the allegations of paragraph "20" of the complaint.

4. Defendant ARKE, INC., upon information and belief, denies the allegations of paragraph "5" of the complaint.

5. Upon information and belief defendant ARKE, INC. denies the allegations of paragraph "6 (a)" of the complaint.

Defendant ARKE, INC. denies the allegations in paragraph "6 (b)" of the complaint, except that it admits that the Certificates of Registration identified in said paragraph were issued by the Register of Copyrights.

Defendant ARKE, INC. denies the allegations of paragraph "6 (c)" of the complaint.

Defendant ARKE, INC. is without knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph "6 (d)" of the complaint.

6. Defendant ARKE, INC. denies the allegations of

paragraph "22" of the complaint.

7. Defendant ARKE, INC., upon information and belief, denies the allegations of paragraph "8" of the complaint.

[462] 8. Upon information and belief defendant ARKE, INC. denies the allegations of paragraph "9 (a)" of the complaint.

Defendant ARKE, INC. denies the allegations in paragraph "9 (b)" of the complaint, except that it admits that the Certificates of Registration identified in said paragraph were issued by the Register of Copyrights.

Defendant ARKE, INC. denies the allegations of paragraph "9 (c)" of the complaint.

Defendant ARKE, INC. is without knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph "9 (d)" of the complaint.

9. Defendant ARKE, INC. denies the allegations of paragraph "24" of the complaint.

10. Defendant ARKE, INC. denies the allegations of paragraphs "11", "13" and "18" of the complaint.

11. Defendant ARKE, INC. is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraphs "12" and "14" of the complaint.

12. Defendant ARKE, INC. denies the allegations of paragraphs "26", "27" and "28" of the complaint.

[463] FURTHER ANSWERING THE COMPLAINT HEREIN, THE DEFENDANT ARKE, INC. AVERS THAT:

13. The complaint fails to state a claim against the said defendant upon which relief can be granted.

14. Plaintiffs failed to publish the respective works alleged in the complaint to be copyrighted and infringed, with notice in the manner and form as required by Section 10 of Title 17, United States Code, and, therefore, each and every one of said alleged copyrights mentioned in the complaint are void, invalid, have no legal effect and are dedicated to the public.

15. Plaintiffs failed to comply with the form of notice prescribed by Section 19, of Title 17, United States Code, in force at the time of the publications of the works alleged to be copyrighted and infringed, and, therefore, each and every one of said alleged copyrights mentioned in the complaint herein are void, invalid, have no legal effect and are dedicated to the public.

16. Plaintiffs have failed to affix the notice of copyright to each copy or reproduction of the alleged copyrighted works published or offered for sale as required by Section 10 of Title 17, United States Code, and, therefore, each and every one of said alleged copyrights are void, invalid, have no legal effect and are dedicated to the public.

[464] 17. Any intended notice carried by each of the works alleged to be infringed and reproductions thereof is incomplete in itself and not distinct or recognizable upon reasonable inspection as a notice of copyright, and does not appear on the face thereof as required by the Copyright Law.

18. The plaintiff, MARCEL BOUCHER, d/b/a BOUCHER, acquiesced in and authorized the publication of each of its said works by the other plaintiff, MARCEL BOUCHER and JEANNE BOUCHER d/b/a MARCEL BOUCHER ET CIE, without the copyright notice as, or not in the form and/or manner required or prescribed by the

Copyright Laws of the United States (Sections 10 and 19 of Title 17, U.S.C.) in force at the time of the publications of said works, and copies or reproductions of the works complained about herein by the plaintiffs were sold to and appeared among retailers and others with the plaintiffs' knowledge and consent without notice or without adequate notice, and said plaintiff, MARCEL BOUCHER d/b/a BOUCHER, by such acquiescence and/or authorization dedicated the same to the public and waived any copyright protection thereof, and is now estopped to claim any rights therein.

19. With respect to the works of ladies costume jewelry mentioned in paragraphs numbered 5 and 8 of the complaint herein and alleged to be protected by the copyrights issued under the Certificate of Registration of Claims to Copyright mentioned and identified in paragraphs numbered "6(b)" and "9(b)" of the complaint herein, the [465] following works or costume jewelry pieces are different from those deposited in the Copyright Office as required under the Copyright Law and bear titles different from those stated and claimed in said Certificates of Registration, and, therefore, are not copyrighted thereunder and are now dedicated to the public. Any alleged copyright notice or portion of copyright notice appearing on the following works or costume jewelry pieces is misleading, deceptive and legally ineffective. Plaintiffs have attempted to obtain copyright protection on more than one work in one registration and for only a single statutory registration fee.

The works or pieces of costume jewelry referred to in this paragraph are as follows:

Pin--	Style No. 5859
Pin--	Style No. 5860
Necklace--	Style No. 5838

Pin--	Style No. 5883
Pin--	Style No. 5878
Pin--	Style No. 5880
Earring--	Style No. 5918
Pin--	Style No. 5946
Pin--	Style No. 5971
Pin--	Style No. 5945
Pin--	Style No. 5921
Earring--	Style No. 5922

[466] 20. With respect to the alleged copyrighted works or pieces of costume jewelry specifically mentioned in the foregoing paragraph "19", the plaintiffs have not complied with the provisions of Section 13 of Title 17, United States Code and the Rules and Regulations of the Copyright Office. The alleged copyrights are invalid and have no legal effect because the plaintiffs failed to file after publication of said works or pieces of costume jewelry two copies of each thereof with the Register of Copyrights and/or to make application for a claim of copyright with the Register of Copyrights on each thereof and to accompany the same with the statutory registration fee, and, therefore, this action for infringement cannot be maintained.

21. Plaintiffs are in Court with unclean hands because they have designated and sold and are continuing to designate and sell copies or reproductions of the said works allegedly copyrighted under the misleading and deceptive name and description "GOLD TEXTURE", when in truth and in fact the said copies or reproductions of the said works of ladies costume jewelry are not made of gold. The public is thus led to believe that it is purchasing items made of gold.

WHEREFORE, defendant ARKE, INC. demands judgment dismissing the complaint against it, together with costs and counsel fees.

MORRIS KIRSCHSTEIN
Attorney for defendant ARKE, INC.
Office & P. O. Address
521 Fifth Avenue
New York 17, N. Y.

[473] REPLY

Plaintiffs, for their Reply to the Counterclaim of defendant, DU BOYES, INC., allege:

1. Admit that the alleged counterclaim is predicated upon the Declaratory Judgment Act (28 U.S.C., Sec. 2201) and upon Rule 13 of the Federal Rules of Civil Procedure, and otherwise deny each and every allegation contained in Paragraph "20" of the Counterclaim.

2. Deny each and every allegation contained in Paragraph "21" of the Counterclaim.

3. Admit the allegations contained in Paragraph "22" of the Counterclaim.

4. Upon information and belief, admit the allegations contained in Paragraph "23" of the Counterclaim.

[474] 5. Deny each and every allegation contained in Paragraph "24" of the Counterclaim, except admit that on or about July 7, 1955, plaintiffs commenced this suit charging the defendant DU BOYES, INC. with infringements of copyrights mentioned in Paragraphs "6(b)" and "9(b)" of the Complaint.

6. Deny each and every allegation contained in Paragraph "25" of the Counterclaim, except admit that plaintiffs have asserted and claimed and still assert and claim that certain ladies costume jewelry of defendant DU BOYES, INC. are and continue to be infringements of plaintiffs' Copyrights.

7. Deny each and every allegation contained in Paragraph "26" of the Counterclaim, except admit that plaintiffs have asserted and claimed and still assert and claim that the defendant DU BOYES, INC. has been publishing, manufacturing, selling and otherwise marketing copies of all of plaintiffs' copyrighted works of art as described in the

Complaint, and has been engaging in unfair trade practices and unfair competition against plaintiffs.

8. Deny each and every allegation contained in Paragraph "27" of the Counterclaim, except admit that plaintiffs have asserted and claimed and still assert and claim that the defendant DU BOYES, INC. has purposely sought to trade on the good will and reputation of plaintiffs by advising its customers that the pieces of costume jewelry sold by it are identical copies of "BOUCHER" original pieces; and that said defendant has deliberately manufactured and sold its copies of plaintiffs' works of art with the intent and pur-
[475]
pose to palm off the said copies as and for genuine and original works of art of the plaintiffs.

9. Deny each and every allegation contained in Paragraphs "28", "29", "30", "31", "32", "33", "34", "35", "36", "37" and "38" of the Counterclaim.

10. Deny each and every allegation contained in Paragraph "39" of the Counterclaim, except admit that plaintiffs will notify the trade if, as and when said defendant infringes plaintiffs' jewelry copyrights.

WHEREFORE, plaintiffs demand judgment against the defendant DU BOYES, INC., dismissing the Counterclaim, together with costs and disbursements.

FORSYTHE, McGOVERN & FETZER,
Attorneys for Plaintiffs,
No. 405 Lexington Avenue,
Borough of Manhattan,
New York 17, New York.

TO:

MAXWELL E. SPARROW, Esq.,
Attorney for Defendant
DU BOYES, INC.,
No. 535 Fifth Avenue,
New York, New York.

[476]

REPLY

Plaintiffs, for their Reply to the Counterclaim of defendants, CAPRI JEWELRY, INC., D. LISNER & CO., INC. (sued as Sidney Lisner d/b/a D. Lisner & Company), JULES STEINBERG, MORRIS KIMMELMAN, HYMAN SLOVITT, ABRAHAM J. SLOVITT and SAMUEL FRIEDMAN (sued as JULES STEINBERG and I. SLOVITZ) d/b/a B. STEINBERG-KASLO COMPANY, VOLUPTE, INC. and WALTER HEIMLER, INC., allege:

1. Admit that the alleged counterclaim is predicated upon the Declaratory Judgment Act (28 U.S.C., Sec. 2201) and upon Rule 13 of the Federal Rules of Civil Procedure, and otherwise deny each and every allegation contained in Paragraph "96" of the Counterclaim.

2. Deny each and every allegation contained in Paragraph "97" of the Counterclaim.

3. Admit the allegations contained in Paragraph "98" of the Counterclaim.

[477] 4. Upon information and belief, admit the allegations contained in Paragraphs "99", "100", "101", "102", and "103" of the Counterclaim.

5. Deny each and every allegation contained in Paragraph "104" of the Counterclaim, except admit that on or about July 7, 1955, plaintiffs commenced this suit charging the defendants with infringements of copyrights mentioned in Paragraphs "6(b)" and "9(b)" of the Complaint.

6. Deny each and every allegation contained in Paragraph "105" of the Counterclaim, except admit that plaintiffs have asserted and claimed and still assert and claim that certain of defendants'

ladies costume jewelry are and continue to be infringements of plaintiffs' Copyrights.

7. Deny each and every allegation contained in Paragraph "106" of the Counterclaim, except admit that plaintiffs have asserted and claimed and still assert and claim that the defendants have been publishing, manufacturing, selling and otherwise marketing copies of all of plaintiffs' copyrighted works of art as described in the Complaint, and have been engaging in unfair trade practices and unfair competition against plaintiffs.

8. Deny each and every allegation contained in Paragraph "107" of the Counterclaim, except admit that plaintiffs have asserted and claimed and still assert and claim that the defendants have purposely sought to trade on the good will and reputation of plaintiffs by advising [478] their customers that the pieces of costume jewelry sold by them are identical copies of "BOUCHER" original pieces; and that said defendants have deliberately manufactured and sold their copies of plaintiffs' works of art with the intent and purpose to palm off the said copies as and for genuine and original works of art of the plaintiffs.

9. Deny each and every allegation contained in Paragraphs "108", "109", "110", "111", "112", "113", "114", "115" and "116" of the Counterclaim.

10. Deny each and every allegation contained in Paragraph "117" of the Counterclaim, except upon information and belief admit that B. STEINBERG-KASLO COMPANY is engaged in the business as manufacturers of costume jewelry.

11. Deny each and every allegation contained in Paragraphs "118" and "119" of the Counterclaim.

12. Deny each and every allegation contained in Paragraph "120" of the Counterclaim, except admit that plaintiffs will notify the trade if, as and when said defendants infringe plaintiffs' jewelry copyrights.

WHEREFORE, plaintiffs demand judgment against the defendants, and each of them, dismissing the Counterclaim, together with costs and disbursements.

FORSYTHE, McGOVERN & FETZER,
Attorneys for Plaintiffs,
No. 405 Lexington Avenue,
Borough of Manhattan,
New York 17, New York.

To: MAXWELL E. SPARROW, Esq.
Attorney for Defendants, CAPRI
JEWELRY, INC., D. LISNER &
CO., INC., VOLUPTE, INC. And
WALTER HEIMLER, INC., and
B. STEINBERG-KASLO COMPANY
535 Fifth Avenue,
New York, New York.

[607]

STIPULATION

IT IS HEREBY STIPULATED AND AGREED, by and between the attorneys for plaintiffs and the attorney for the defendants other than ARKE, INC., that the motion of the defendants now returnable in this Court on October 18, 1956, to amend their answer so as to add thereto a proposed "TWELFTH DEFENSE", "THIRTEENTH DEFENSE" and "FOURTEENTH DEFENSE", be, and the same hereby is consented to, and the answer of defendants be, and the same hereby is deemed to contain a "TWELFTH DEFENSE", "THIRTEENTH DEFENSE", and "FOURTEENTH DEFENSE" in the form set forth in said defendants' notice of motion as aforesaid, as if fully set forth at length in the answer of said defendants; and,

IT IS FURTHER STIPULATED AND AGREED, that the foregoing consent to the amendment of the answer be, and the same hereby is, without prejudice to the rights of plaintiffs to move with respect thereto.

Dated: New York, N.Y.
October 16, 1956.

/s/ Forsythe, McGovern & Fetzer
Attorneys for Plaintiffs

/s/ Maxwell E. Sparrow
Attorney for Defendants

[608]

TWELFTH DEFENSE

The Register of Copyrights exceeded the authority vested in him by the Copyright Law (17 U.S.Code) in accepting plaintiffs' said articles of costume jewelry as copyrightable works of art and issuing the Certificates of Copyright Registration alleged in the Complaint.

THIRTEENTH DEFENSE

The Librarian of Congress and the Register of Copyrights exceeded the authority vested in them by Section 207 of Title 17, U.S. Code (The Copyright Law) to make rules and regulations for the registration of claims to copyright, in issuing to plaintiffs the Certificates of Copyright Registration alleged in the Complaint.

FOURTEENTH DEFENSE

The Register of Copyrights with the approval of the Librarian of Congress went beyond the authority vested in him by the Copyright Law (17 U.S. Code-Sec. 207) in amending the section 201.4 (b) (7) of the regulations of the Copyright Office as it existed prior to December 22, 1948 which read

> "Works of art and models or designs for works of art. This term includes all works belonging fairly to the so-called fine arts. (Paintings, drawings, and sculpture.)
>
> "The protection of productions of the industrial arts utilitarian in purpose and character even if artistically made or ornamented depends upon action under the patent law; but registration in the Copyright Office has been made to protect artistic drawings notwithstanding they may afterwards be utilized for articles of manufacture.

[609]

> "Toys, games, dolls, advertising novelties, instruments, or tools of any kind, glassware, embroideries, garments, laces, woven

> fabrics, or similar articles, are examples. The exclusive right to make and sell such articles should not be sought by copyright registration."

to section 202.7 which reads

> "Works of art (Class G)-(a) In General. This class includes works of artistic craftsmanship, insofar as their form but not their mechanical or utilitarian aspects are concerned, such as artistic jewelry, enamels, glassware, and tapestries, as well as all works belonging to the fine arts, such as paintings, drawings and sculpture. Works of art and models or designs for works of art are registered in Class G on Form G, except published three-dimensional works of art which require Form GG."

without the approval or an Act of Congress of the United States, the said amendment not being within the discretionary powers of the Librarian of Congress and/or the Register of Copyrights.

[Order]

[610] A Motion to amend the defendants' answer having been noticed for hearing before this Court on the 18th day of October, 1956, and upon the call of the calendar the said Motion having been marked granted by consent of the parties,

Now upon the foregoing and the annexed Stipulation of consent to the amendment of the answer it is

ORDERED, ADJUDGED and DECREED, that the defendants' answer be amended by adding thereto the annexed TWELFTH, THIRTEENTH and FOURTEENTH DEFENSES; and it is further

ORDERED, ADJUDGED and DECREED that the foregoing amendment is without prejudice to the rights of plaintiffs to move with respect thereto.

/s/ David N. Edelstein
Judge, United States
District Court

Dated: New York, N. Y.
November 1, 1956.

[611]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This cause having come on for trial and the respective parties hereto having appeared and having presented their respective proofs, and testimony having been taken in open court on the 26th, 27th and 28th days of November, 1956, and the Court having heard the arguments of counsel on the 12th day of December, 1956, and upon due deliberation having been had, the Court decides as follows, stating its findings of fact and conclusions of law:

FINDINGS OF FACT

1. The Court has jurisdiction of this action under Title 28, United States Code, Section 1338.

2. Prior to June 14, 1954, plaintiff, MARCEL BOUCHER, created the following original pieces of artistic ladies' costume jewelry, upon which Copyright Registrations were issued as hereinafter set forth:

[612] (a) Pin No. 5877 and Pin No. 5878 (plaintiffs' Exhibits 2 and 3). Copyright Registration GP 7106, Class G, was issued on Pin No. 5877 on September 21, 1954. Pin No. 5878 is a repetition and representation of the basic design of Pin No. 5877 and is covered by the said copyright on Pin No. 5877.

(b) Earrings No. 5807 and Earrings No. 5836 (plaintiffs' Exhibits 6 and 7). Copyright Registration GP 7115, Class G, was issued on Earrings No. 5807 on September 21, 1954. Earrings No. 5836 are a repetition and representation of the basic design of Earrings No. 5807 and are covered by the said copyright on Earrings No. 5807.

(c) Pin No. 5816, Pin No. 5817 and Pin No. 5859

(plaintiffs' Exhibits 9, 10 and 11). Copyright Registration GP 7123, Class G, was issued on Pin No. 5816 on September 21, 1954. Pin Nos. 5817 and 5859 are a repetition and representation of the basic design of Pin No. 5816 and are covered by the said copyright on Pin No. 5816.

(d) Necklace No. 5831, Necklace No. 5837, and Necklace No. 5838 (plaintiffs' Exhibits 13, 14 and 15). Copyright Registration GP 7109, Class G. was issued on Necklace No. 831 on September 21, 1954. Necklace Nos. 5837 and 5838 are repetitions and representations of a copyrightable component part of the basic design of Necklace No. 5831 and are covered by the said copyright on Necklace No. 5831.

All of the aforesaid pieces of costume jewelry were duly published by plaintiffs on or about June 14, 1954, by the sale of copies thereof having the statutory copyright notice affixed thereto.

[613] 3. Prior to January 2, 1955, plaintiff, MARCEL BOUCHER, created the following original pieces of artistic ladies' costume jewelry, upon which Copyright Registrations were issued as hereinafter set forth:

(a) Earrings No. 5917 and Earrings No. 5918 (plaintiffs' Exhibits 17 and 18). Copyright Registration GP 7849, Class G, was issued on Earrings No. 5917 on March 9, 1955. Earrings No. 5918 are a repetition and representation of the basic design of Earrings No. 5917 and are covered by the said copyright on Earrings No. 5917.

(b) Pin No. 5928 and Pin No. 5926 (plaintiffs' Exhibits 20 and 21). Copyright Registration GP 7855, Class G, was issued on Pin No. 5928 on March 9, 1955. Pin No. 5946 is a repetition and representation of the basic design of Pin No. 5928 and is covered by the said

copyright on Pin No. 5928.

(c) Pin No. 5929 (plaintiffs' Exhibit 23). Copyright Registration GP 7856, Class G, was issued on Pin No. 5929 on March 9, 1955.

(d) Pin No. 5947, Pin No. 5971, Pin No. 5945, Earrings No. 5984, and Earrings No. 5983 (plaintiffs' Exhibits 25, 26, 27, 28 and 29). Copyright Registration GP 7866, Class G, was issued on Pin No. 5947 on March 9, 1955. Pin No. 5971, Pin No. 5945, Earrings No. 5984 and Earrings No. 5983 are repetitions and representations of the basic design of Pin No. 5947 and are covered by the said copyright on Pin No. 5947.

(e) Necklace No. 5913, (plaintiffs' Exhibit 31). Copyright Registration GP 7847, Class G, was issued on Necklace No. 5913 on March 9, 1955.

[614] (f) Pin No. 5919 and Pin No. 5921 (plaintiffs' Exhibits 33 and 34). Copyright Registration GP 7890, Class G, was issued on Pin No. 5919 on March 9, 1955. Pin No. 5921 is a repetition and representation of the basic design of Pin No. 5919 and is covered by the said copyright on Pin No. 5919.

(g) Earrings No. 5920 and Earrings No. 5922 (plaintiffs' Exhibits 36 and 37). Copyright registration GP 7851, Class G, was issued on Earrings No. 5920 on March 9, 1955. Earrings No. 5922 are a repetition and representation of the basic design of Earrings No. 5920 and are covered by the said copyright on Earrings No. 5920.

All of the aforesaid pieces of costume jewelry were duly published by plaintiffs on or about January 2, 1955 by the sale of copies thereof having the statutory copyright notice affixed thereto.

4. Prior to June 14, 1954, MARCEL BOUCHER duly licensed MARCEL BOUCHER ET CIE. to manufacture and sell reproductions of all of the articles of costume jewelry covered by the aforesaid Copyright Registrations and to use the copyrights secured thereon.

5. By reason of the quantity of the aforesaid articles of costume jewelry sold by plaintiffs, the said articles were accepted by the public as artistic works and works of artistic design.

6. The aforesaid jewelry pieces are works of artistic craftsmanship conceived as original with plaintiff, MARCEL BOUCHER, and constitute copyrightable subject matter entitled to the protection of the Copyright Laws of the United States.

[615] 7. All of the aforesaid copyrights were duly and lawfully issued to plaintiff, MARCEL BOUCHER.

8. Plaintiffs complied with the statutory requirements of notice under the Copyright Laws in the sale and marketing by them of all of the aforesaid articles of costume jewelry.

9. Plaintiffs are the sole proprietors of all right, title and interest in and to the copyrights in the aforesaid articles of costume jewelry.

10. The defendants and each of them infringed all of the aforesaid copyrights by making, marketing, selling, offering for sale, or otherwise disposing of articles of costume jewelry, among which are the following:

Plaintiffs' Copyrights and Articles Covered Thereunder	Defendants' Articles Infringing Plaintiffs' Respective Copyrights
1) GP 7106, Class G Pin No. 5877 (Pl. Ex. 2) " " 5878 (Pl. Ex. 3)	Pins (Pl. Exs. 48 & 49)

Plaintiffs' Copyrights and Articles Covered Thereunder	Defendants' Articles Infringing Plaintiffs' Respective Copyrights
(2) GP 7115, Class G Earrings No. 5807 (Pl. Ex. 6) " " 5836 (Pl. Ex. 7)	Earrings (Pl. Exs. 50 & 51)
(3) GP 7123, Class G Pin No. 5816 (Pl. Ex. 9) " " 5817 (Pl. Ex. 10) " " 5859 (Pl. Ex. 11)	Pin (Pl. Ex. 54)
(4) GP 7109, Class G Necklace No. 5831 (Pl. Ex. 13) " " 5837 (Pl. Ex. 14) " " 5838 (Pl. Ex. 15)	Necklaces (Pl. Exs. ~~50~~ 52 & 53)
(5) GP 7849, Class G Earrings No. 5917 (Pl. Ex. 17) " " 5918 (Pl. Ex. 18)	Earring (Pl. Exs. 46 & 47)
(6) GP 7855, Class G Pin No. 5928 (Pl. Ex. 20) " " 5946 (Pl. Ex. 21)	Pins (Pl. Exs. 45 & 44) Bracelet (Pl. Ex. 61)
[616] (7) GP 7856, Class G Pin No. 5929 (Pl. Ex. 23)	Pins (Pl. Exs. 64 & 65)
(8) GP 7866, Class G Pin No. 5947 (Pl. Ex. 25) Pin No. 5971 (Pl. Ex. 26) Pin No. 5945 (Pl. Ex. 27) Earrings, No. 5984 (Pl. Ex. 28) Earrings, No. 5983 (Pl. Ex. 29)	Pins (Pl. Exs. 55 & 56) and Earrings (Pl. Exs. 57 & 58)
(9) GP 7847, Class G Necklace No. 5913 (Pl. Ex. 31)	Necklace (Pl. Exs. 59 & 60) and Bracelet (Pl. Ex. 61)
(10) GP 7850, Class G Pin No. 5919 (Pl. Ex. 33) Pin No. 5921 (Pl. Ex. 34)	Pins (Pl. Exs. 66 and 67)
(11) GP 7851, Class G Earrings No. 5920 (Pl. Ex. 36) Earrings No. 5922 (Pl. Ex. 37)	Earrings (Pl. Exs. 62 & 63)

11. Defendants did not represent that any of the products marketed by them were the product of plaintiffs.

12. All of the individual defendants deliberately copied plaintiffs' copyrighted articles of costume jewelry. The said

individual defendants used the plaintiffs' articles as models from which rubber molds were made. Identical reproductions of plaintiffs' articles were then produced in the rubber molds.

13. After due notice by the plaintiffs to the [617] defendants of the plaintiffs' claim of infringement, the said individual defendants continued to infringe upon plaintiffs' copyrights as aforesaid and all of the defendants did market, attempt to market or prepared to market articles of costume jewelry which had been so produced and were infringements on plaintiffs' aforesaid copyrights, excepting, however, that plaintiffs' have offered no proof of infringements with respect to copyright registrations namely, GP 7107, Class G (Ex. 7 and 8 of complaint); GP 7125, Class G, (Ex. 10 of complaint); GP 7124 G (Ex. 9 of complaint); GP 7111, Class G (Ex. 13 and 14 of complaint); GP 7846 Class G (Ex. 24 of complaint); GP 7848, Class G (Ex. 25 of complaint); GP 7852, Class G (Ex. 30 of complaint); GP 7854, Class G (Ex. 31 of complaint).

Upon the foregoing Findings of Fact, the Court makes the following:

CONCLUSIONS OF LAW

1. All of the plaintiffs' aforesaid pieces in suit are properly the subject of copyright under the Copyright Laws of the United States.

2. Since on or about September 21, 1954, plaintiff, MARCEL BOUCHER, has been the owner of valid copyrights on the aforesaid original artistic costume jewelry, as follows: GP 7115, Class G; GP 7123, Class G; GP 7106, Class G; and GP 7109, Class G.

3. Since on or about March 9, 1955, plaintiff, MARCEL BOUCHER, has been the owner of valid copyrights on the aforesaid

original artistic costume jewelry as follows: GP 7849, Class G; GP 7855, Class G; GP 7856, Class G; GP 7866, Class G; GP 7847, Class G; GP 7850, Class G; and GP 7851, Class G.

4. Defendants have infringed all of the said copyrights on the said original artistic costume jewelry.

[618] 5. Plaintiffs are entitled to a decree against the defendants and each of them, their agents, servants and employees, and all persons, firms and corporations acting by, through, under, or in concert with, or under the control, direction, commission or license of the defendants, or any of them, in any manner whatsoever, whether directly or indirectly, permanently enjoining and restraining them and each of them from infringing plaintiffs' copyrights in the aforesaid articles of costume jewelry in any manner whatsoever, and from publishing, selling, manufacturing, marketing or otherwise disposing of any copies of the aforesaid articles of costume jewelry. Plaintiffs' have not established their right to any relief with respect to any copyrights not set forth in paragraphs 2 and 3 hereof.

6. Plaintiffs are entitled to recover from the individual defendants (other than corporate defendants) jointly and severally, such damages as plaintiffs have sustained in consequence of infringement of plaintiffs' copyrights, by each and every one of the defendants, from the first date of infringement and as long as the infringement has continued up to the date hereof. Plaintiffs are entitled to recover separately of each of the corporate defendants only such damages as plaintiffs have sustained in consequence of such infringement of said copyrights as have been or may be committed by each separate corporate defendant only.

7. The plaintiffs are entitled to an accounting, to the

extent provided by paragraph "6" hereof, of all the gains, profits, emoluments and advantages derived, or which may be derived from the infringement of the plaintiffs' copyrights by the defendants and each of them, from whatsoever source, whether directly or indirectly, [619] from the first date of infringement and as long as the infringement has continued or may continue, or, in lieu thereof, to statutory copyright damages, all in accordance with the provisions of the Copyright Act.

8. Plaintiffs are entitled to a decree against the defendants requiring defendants, and each of them, to deliver up for destruction, all infringing copies and devices, and all plates, molds, matrices and other means for making such infringing copies of plaintiffs' copyrighted jewelry articles.

9. Plaintiffs are entitled to receive from defendants the costs of this action, and reasonable attorneys' fees, to be assessed by the Court pursuant to Section 116 and other provisions of the Copyright Act.

10. The claim of plaintiffs for unfair competition is dismissed on the merits.

11. The counterclaim of defendants for a declaratory judgment is dismissed on the merits.

Judgment in accordance herewith should be entered.

/s/ Sylvester J. Ryan
United States District Judge

Dated, New York, N.Y.

January 7, 1957

[628]

JUDGMENT

This cause having come on for trial on the 26th, 27th and 28th days of November, and the 12th day of December 1956, and the Court having duly made its Findings of Fact and Conclusions of Law and having found that the plaintiffs own valid copyrights on original artistic costume jewelry and that defendants have infringed the said copyrights, and upon due deliberation having been had, and upon motion of Forsythe, McGovern & Fetzer, attorneys for plaintiffs, it is

ORDERED, ADJUDGED AND DECREED that the defendants and each of them, their agents, servants and employees, and all persons, firms and corporations acting by, through, under or in concert with, or under the control, direction, commission or license of the defendants, or any of them, in any manner whatsoever, whether directly or indirectly, be and they hereby are permanently enjoined and restrained from infringing in any manner the plaintiff's copyrights in the articles of costume jewelry [629] covered by the following copyrights, and from publishing, selling, manufacturing, marketing, or otherwise disposing of any copies of plaintiffs' articles of costume jewelry covered by the following copyrights:

GP 7115, Class G, September 21, 1954

GP 7123, Class G, September 21, 1954

GP 7106, Class G, September 21, 1954

GP 7109, Class G, September 21, 1954.

GP 7849, Class G, March 9, 1955

GP 7855, Class G, March 9, 1955

GP 7856, Class G, March 9, 1955

GP 7866, Class G, March 9, 1955

GP 7847, Class G, March 9, 1955

GP 7850, Class G, March 9, 1955

GP 7851, Class G, March 9, 1955

and it is further

ORDERED, ADJUDGED AND DECREED that the defendants, and each of them, be and they hereby are required and directed to deliver up for destruction to the United States Marshal for the Southern District of New York, all infringing copies and devices, and all plates, molds, matrices and other means for making infringing copies of plaintiffs' copyrighted jewelry articles; and it is further

ORDERED, ADJUDGED AND DECREED, that William S. Evans, Esq., of 75 Maiden Lane, New York City be and he hereby is appointed Special Master to hear the proof of the parties in relation to damages and profits, and to report his findings thereon to the Court; and it is further

[630] ORDERED, ADJUDGED AND DECREED that the defendants JULES STEINBERG, MORRIS KIMMELMAN, HYMAN SLOVITT, ABRAHAM J. SLOVITT and SAMUEL FRIEDMAN, jointly and severally, shall pay to the plaintiffs such damages as the plaintiffs have sustained due to the defendants' infringements up to date hereof; and it is further

ORDERED, ADJUDGED AND DECREED that the defendants DU BOYES, INC., ARKE, INC., CAPRI JEWELRY,INC., VOLUPTE, INC. and WALTER HEIMLER, INC., each shall separately pay to the plaintiffs such damages as the plaintiffs have sustained due to the infringements of each separate corporate defendant only.

ORDERED, ADJUDGED AND DECREED that the defendants, and each of them, shall account for and pay over to the plaintiffs all the gains, profits, emoluments and advantages derived, or which may

be derived by the defendants from their said infringements; and it is further

ORDERED, ADJUDGED AND DECREED that the defendants and each of them, shall pay to the plaintiffs all their legal costs and disbursements in this action, together with a reasonable attorney's fee for the legal services of plaintiffs' attorneys in this action, the amount of said fee to be awarded by the Court on proper application; and it is further

ORDERED, ADJUDGED AND DECREED that the plaintiffs' claim for unfair competition be and the same hereby is dismissed with prejudice; and it is further

[631] ORDERED, ADJUDGED AND DECREED that the defendants' counterclaim for a declaratory judgment be and the same hereby is dismissed, with prejudice.

Dated: New York, N.Y.
January 7, 1957

/s/ Sylvester J. Ryan
United States District Judge

Judgment entered January 7, 1957
Herbert A. Charlson,
Clerk.

[636] NOTICE OF APPEAL TO COURT OF APPEALS

Notice is hereby given that DUBOYES, INC., ARKE, INC., CAPRI JEWELRY, INC., JULES STEINBERG, MORRIS KIMMELMAN, HYMAN SLOVITT, ABRAHAM J. SLOVITT and SAMUEL FRIEDMAN d/b/a B. STEINBERG-KASLO COMPANY (sued as JULES STEINBERG and I. SLOVITZ d/b/a B. STEINBERG-KASLO COMPANY) VOLUPTE, INC. and WALTER HEIMLER, INC., defendants above named, hereby appeal to the United States Court of Appeals for the Second Circuit from the Judgment entered in this action on 7 January 1957.

/s/ Maxwell E. Sparrow

Maxwell E. Sparrow
Attorney for Appellant
Office and P. O. Address
535 Fifth Avenue
New York 17, N. Y.

Dated: 30 January 1957

[1850]

FINAL JUDGMENT

The above-entitled action for copyright infringement having been instituted by plaintiffs on the 7th day of July, 1955, and the Court having duly made its Findings of Fact and Conclusions of Law on the 7th day of January, 1957, and having found that plaintiffs own valid copyrights on original artistic costume jewelry and that defendants had infringed the said copyrights, and the Court having duly made its Interlocutory Judgment on the 7th day of January, 1957, permanently enjoining and restraining defendants from infringing plaintiffs' copyrights in the articles of costume jewelry covered by the following copyrights:

GP 7115, Class G, September 21, 1954
GP 7123, Class G, September 21, 1954
GP 7106, Class G, September 21, 1954
GP 7109, Class G, September 21, 1954
GP 7849, Class G, March 9, 1955
GP 7855, Class G, March 9, 1955
GP 7856, Class G, March 9, 1955
GP 7866, Class G, March 9, 1955

[1851]

GP 7847, Class G, March 9, 1955
GP 7850, Class G, March 9, 1955
GP 7851, Class G, March 9, 1955

and the Court by said Interlocutory Judgment having appointed William S. Evans, Esq., of 75 Maiden Lane, New York City, Special Master to hear the proof of the parties in relation to damages and profits and to report his findings to the Court, and having further ordered that the defendants pay to plaintiffs all of their taxable costs and disbursements together with a reasonable fee for the legal services of

plaintiffs' attorneys in this action,

NOW, upon reading and filing the report of William S. Evans, Esq., Special Master, dated the 14th day of August, 1957, stating the net profits of the manufacturing defendants, JULES STEINBERG, MORRIS KIMMELMAN, HYMAN SLOVITT, ABRAHAM J. SLOVITT and SAMUEL FRIEDMAN (a partnership doing business as B. STEINBERG-KASLO COMPANY) to be $19,776.79, and the net profits of the other defendants to be: DU BOYES, INC. - $402.00; ARKE, INC. - $98.00; CAPRI JEWELRY, INC. - $490.00; VOLUPTE, INC. - $916.00; and WALTER HEIMLER, INC. - $94.00; and upon reading and filing plaintiffs' notice of motion dated the 30th day of August, 1957, for an order confirming the report of the Special Master and fixing the reasonable attorney's fee heretofore awarded to plaintiffs, and the affidavit of Thomas A. McGovern, Esq., annexed to said notice of motion and setting forth all of the legal services rendered to plaintiffs by himself and by Burton L. Knapp, Esq., trial counsel in this action, and defendants not having opposed confirmation of the said report of the Special Master, and the Court having duly filed its written memorandum, dated the 19th day of September, 1957, confirming the report of the Special Master in all respects and fixing the fee of the Special Master in the sum of $2,665.00, and directing the payment thereof by defendants, and the Court having filed a further written memorandum on the 19th day of September, 1957, fixing a reasonable attorney's fee in the sum of $10,000.00 for the services of plaintiffs' attorneys in this action, pursuant to Section 116 of the Copyright Act, and directing the entry of a final judgment against all of the defendants for the amounts found by the Special Master, and directing that plaintiffs' taxable costs and disbursements, including

[1852]

said attorney's fee, be recovered from the manufacturing defendants, JULES STEINBERG, MORRIS KIMMELMAN, HYMAN SLOVITT, ABRAHAM J. SLOVITT and SAMUEL FRIEDMAN (a partnership doing business as B. STEINBERG-KASLO COMPANY), and upon motion of Forsythe, McGovern & Fetzer, Esqs., attorneys for plaintiffs, and upon due deliberation having been had, it is

ORDERED, ADJUDGED AND DECREED that the report of William S. Evans, Esq., Special Master, dated the 14th day of August, 1957, be and the same hereby is confirmed in all respects, and that the findings of fact and conclusions of law of the Special Master be and they hereby are adopted as the findings of fact and conclusions of law of this Court, and it is further

ORDERED, ADJUDGED AND DECREED that the reasonable attorney's fee for the legal services rendered to plaintiffs in this action, pursuant to Section 116 of the Copyright Act, be and the same hereby is fixed in the sum of $10,000.00, and it is further

[1853] ORDERED, ADJUDGED AND DECREED that plaintiffs, MARCEL BOUCHER d/b/a BOUCHER and MARCEL BOUCHER and JEANNE BOUCHER d/b/a MARCEL BOUCHER ET CIE., all of 304 East 23d Street, New York City, recover from defendants, JULES STEINBERG, residing at 218 Waverly Avenue, East Rockaway, New York, MORRIS KIMMELMAN, residing at 1635 Popham Road, Bronx, New York, HYMAN SLOVITT, residing at 147-23 Charter Road, Jamaica, New York, ABRAHAM J. SLOVITT, residing at 2427 East 19th Street, Brooklyn, New York, and SAMUEL FRIEDMAN (a partnership doing business as B. STEINBERG-KASLO COMPANY at 7 West 36th Street, New York City) the sum of $19,776.79, representing the net

profits of said defendants from their deliberate infringements of plaintiffs' copyrights as found by this Court, together with the reasonable attorney's fee as fixed herein in the sum of $10,000.00, and plaintiffs' other taxable costs and disbursements as allowed in the sum of $960.43, making a total recovery against said defendants in the sum of $30,757.22; and that plaintiffs have execution therefor; and it is further

ORDERED, ADJUDGED AND DECREED that plaintiffs recover from defendant, DU BOYES, INC., of 14 East 38th Street, New York City, the sum of $402.00; from defendant, ARKE, INC., of 411 Fifth Avenue, New York City, the sum of $98.00; from defendant, CAPRI JEWELRY, INC. of 392 Fifth Avenue, New York City, the sum of $490.00; from defendant, VOLUPTE, INC. of 393 Fifth Avenue, New York City, the sum of $916.00; and from defendant, WALTER HEIMLER, INC. of 15 West 34th Street, New York City, the sum of $94.00, representing the net profits of said defendants from their infringements of plaintiffs' copyrights as found by the Court; and that plaintiffs have execution therefor.

Dated: New York, N. Y.
1st October 1957

/s/ Sylvester J. Ryan
United States District Judge

Judgment entered October 1, 1957
Herbert A. Charlson,
Clerk.

[1854] NOTICE OF APPEAL TO COURT OF APPEALS

Notice is hereby given that DUBOYES, INC., ARKE, INC., CAPRI JEWELRY, INC., JULES STEINBERG, MORRIS KIMMELMAN, HYMAN SLOVITT, ABRAHAM J. SLOVITT and SAMUEL FRIEDMAN d/b/a B. STEINBERG-KASLO COMPANY (sued as JULES STEINBERG and I. SLOVITZ d/b/a B. STEINBERG-KASLO COMPANY), VOLUPTE, INC., and WALTER HEIMLER, INC., defendants above named, hereby appeal to the United States Court of Appeals for the Second Circuit from the Final Judgment entered in this action on October 1, 1957.

/s/ Maxwell E. Sparrow

Maxwell E. Sparrow
Attorney for Defendants
535 Fifth Avenue
New York 17, N.Y.

Dated: New York, New York
October 10, 1957

PAGE 1a

Additional Certificate (17 U.S.C 215)

CERTIFICATE OF REGISTRATION

OF A CLAIM TO COPYRIGHT IN A PUBLISHED THREE-DIMENSIONAL WORK OF ART

REGISTRATION NO. G pub. 7106 CLASS G

THIS IS TO CERTIFY that the following statements for the work herein named have been made a part of the records of the Copyright Office. In witness whereof the seal of the Copyright Office is hereto affixed.

Register of Copyrights
United States of America

1. COPYRIGHT CLAIMANT OR CLAIMANTS (Full NAMES and ADDRESSES):

Marcel Boucher d/b/a Boucher

304 East 23rd Street, New York 10, N. Y.

2. TITLE OF WORK Pin-Style No. 5877

3. AUTHOR (The word "author" includes an employer in the case of works made for hire). Full name and pseudonym, if any, are requested for cataloging purposes. Citizenship *must* be given.

Name Marcel (First) Boucher (Middle) (Last) Citizenship U.S. (Country)

Domicile 4143 Richmond Avenue, Eltingville, S.I., N. Y. (Address)

4. PUBLISHER AND DATE:

(a) Published by Marcel Boucher et Cie (Name) at New York City (Place)

(b) Date first placed on sale, sold, or publicly distributed 6 14 1954 (Month, day, and year)

DATES OF RECEIPT IN COPYRIGHT OFFICE			
APPLICATION			
	SEPT	21	1954
ONE COPY			
TWO COPIES			
	SEPT	21	1954
2 PHOTOGRAPH			
	SEPT	21	1954
FEE			

5. SEND CERTIFICATE TO: (If refund or other communications are to be sent to another person, give his name in space 6.)

Name Marcel Boucher et Cie

Address 304 East 23rd Street (Number and street)

New York (City) 10 (Zone) N. Y. (State)

TURN THIS PAGE

6. Name ..... Address .....

16—63004-1

7. Describe the work briefly Metal Pin

8. Principal material of which made Tin Alloy or other material

9. Longest dimension in inches Approximately 3"

10. (*a*) Wording of copyright notice appearing on work (C) Boucher

Location of notice Stamped on back of pin

(*b*) If name of copyright owner appears elsewhere than in notice, give wording

Location of name

11. Indicate by check if Option A or B stated in the instructions given below is selected. ***If there is no check, it will be assumed that OPTION C, in which photographs but no copies are deposited, is desired.***

Option A ☐ **Option B** ☒

* * * *

INSTRUCTIONS FOR SECURING REGISTRATION OF COPYRIGHT IN A PUBLISHED THREE-DIMENSIONAL WORK OF ART

All applications for copyright registration of published three-dimensional works of art in Class G shall be accompanied by as many photographs, in black and white or in color, as are necessary to identify the work. Each photograph shall not be larger than 9 by 12 inches, but preferably shall be 8 by 10 inches, nor shall it present an image of the work smaller than 4 inches in its greatest dimension. The title of the work shall appear on each photograph.

In addition to the photographs, application on Form GG, and the statutory registration fee, each applicant shall select and comply with one of the following options:

OPTION "A"

Send two copies of the best edition of the work (or one copy, if by a foreign author and published in a foreign country).

The Copyright Office will retain the copies for disposition in accordance with its usual practice.

OPTION "B"

Send two copies of the best edition of the work (or one copy, if by a foreign author and published in a foreign country) *and in addition* mark the package with the special label supplied by the Copyright Office or by the use of other appropriate means indicating that Option "B" has been chosen.

The Copyright Office will promptly return the copies to the copyright claimant or to his agent, at an address within the United States at his expense.

OPTION "C"

Send no copies of the work. If Option "C" is selected, the Copyright Office will issue its certificate, bearing a notation that photographs were accepted in place of copies, but expresses no opinion as to the need for, or possible effect of delay in, making deposit of copies prior to suit for infringement of copyright.

U. S. GOVERNMENT PRINTING OFFICE 16—63904-1

Plaintiffs' Exh. No. 8

Additional Certificate (17 U.S.C. 215)

CERTIFICATE OF REGISTRATION

OF A CLAIM TO COPYRIGHT IN A PUBLISHED THREE-DIMENSIONAL WORK OF ART

REGISTRATION NO. G pub. 7115

CLASS G

THIS IS TO CERTIFY that the following statements for the work herein named have been made a part of the records of the Copyright Office. In witness whereof the seal of the Copyright Office is hereto affixed.

Register of Copyrights
United States of America

1. COPYRIGHT CLAIMANT OR CLAIMANTS (Full NAMES and ADDRESSES):

Marcel Boucher d/b/a Boucher

304 East 23rd Street, New York 10, N. Y.

2. TITLE OF WORK Earring-Style No. 5807

3. AUTHOR (The word "author" includes an employer in the case of works made for hire). Full name and pseudonym, if any, are requested for cataloging purposes. Citizenship *must* be given.

Name Marcel (First) (Middle) Boucher (Last) Citizenship U.S. (Country)

Domicile 4143 Richmond Avenue, Eltingville, S.I., N.Y. (Address)

4. PUBLISHER AND DATE:

(a) Published by Marcel Boucher et Cie (Name) at New York City (Place)

(b) Date first placed on sale, sold, or publicly distributed 6 14 1954 (Month, day, and year)

DATES OF RECEIPT IN COPYRIGHT OFFICE			
APPLICATION	SEPT	21	1954
ONE COPY			
TWO COPIES	SEPT	21	1954
2 PHOTOGRAPH	SEPT	21	1954
FEE			

5. SEND CERTIFICATE TO: (If refund or other communications are to be sent to another person, give his name in space 6.)

Name Marcel Boucher et Cie

Address 304 East 23rd Street (Number and street)

New York (City) 10 (Zone) N. Y. (State)

TURN THIS PAGE

6. Name ..... Address .....

16—68904-1

7. Describe the work briefly Metal Earring

8. Principal material of which made Tin Alloy or other material

9. Longest dimension in inches Approximately 1"

10. (*a*) Wording of copyright notice appearing on work (C) Boucher

Location of notice Stamped on back of earring

(*b*) If name of copyright owner appears elsewhere than in notice, give wording

Location of name

11. Indicate by check if Option A or B stated in the instructions given below is selected. ***If there is no check, it will be assumed that OPTION C, in which photographs but no copies are deposited, is desired.***

Option A ☐ **Option B** ☒

* * * *

INSTRUCTIONS FOR SECURING REGISTRATION OF COPYRIGHT IN A PUBLISHED THREE-DIMENSIONAL WORK OF ART

All applications for copyright registration of published three-dimensional works of art in Class G shall be accompanied by as many photographs, in black and white or in color, as are necessary to identify the work. Each photograph shall not be larger than 9 by 12 inches, but preferably shall be 8 by 10 inches, nor shall it present an image of the work smaller than 4 inches in its greatest dimension. The title of the work shall appear on each photograph.

In addition to the photographs, application on Form GG, and the statutory registration fee, each applicant shall select and comply with one of the following options:

OPTION "A"

Send two copies of the best edition of the work (or one copy, if by a foreign author and published in a foreign country).

The Copyright Office will retain the copies for disposition in accordance with its usual practice.

OPTION "B"

Send two copies of the best edition of the work (or one copy, if by a foreign author and published in a foreign country) *and in addition* mark the package with the special label supplied by the Copyright Office or by the use of other appropriate means indicating that Option "B" has been chosen.

The Copyright Office will promptly return the copies to the copyright claimant or to his agent, at an address within the United States at his expense.

OPTION "C"

Send no copies of the work. If Option "C" is selected, the Copyright Office will issue its certificate, bearing a notation that photographs were accepted in place of copies, but expresses no opinion as to the need for, or possible effect of delay in, making deposit of copies prior to suit for infringement of copyright.

U. S. GOVERNMENT PRINTING OFFICE 16—63004-1

Plaintiffs' Exh. No. 12

Additional Certificate (17 U.S.C. 215)

CERTIFICATE OF REGISTRATION

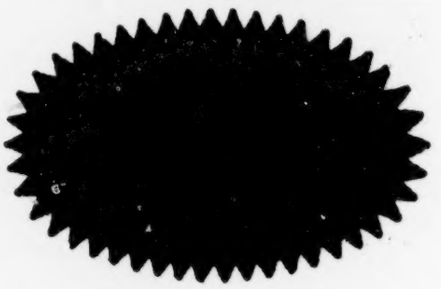
OF A CLAIM TO COPYRIGHT IN A PUBLISHED THREE-DIMENSIONAL WORK OF ART

REGISTRATION NO. G pub. 7123

CLASS G

THIS IS TO CERTIFY that the following statements for the work herein named have been made a part of the records of the Copyright Office. In witness whereof, the seal of the Copyright Office is hereto affixed.

Register of Copyrights
United States of America



1. COPYRIGHT CLAIMANT OR CLAIMANTS (Full NAMES and ADDRESSES):

Marcel Boucher d/b/a Boucher

304 East 23rd Street, New York 10, N. Y.

2. TITLE OF WORK Pin-Style No. 5816

3. AUTHOR (The word "author" includes an employer in the case of works made for hire). Full name and pseudonym, if any, are requested for cataloging purposes. Citizenship *must* be given.

Name Marcel (First) Boucher (Middle) (Last) Citizenship U.S. (Country)

Domicile 4143 Richmond Avenue, Eltingville, S.I., N. Y. (Address)

4. PUBLISHER AND DATE:

(a) Published by Marcel Boucher et Cie (Name) at New York City (Place)

(b) Date first placed on sale, sold, or publicly distributed 6 14 1954 (Month, day, and year)

DATES OF RECEIPT IN COPYRIGHT OFFICE			
APPLICATION			
	SEPT	21	1954
ONE COPY			
TWO COPIES			
	SEPT	21	1954
2 PHOTOGRAPH			
	SEPT	21	1954
FEE			

16—63904-1

5. SEND CERTIFICATE TO: (If refund or other communications are to be sent to another person, give his name in space 6.)

Name Marcel Boucher et Cie

Address 304 East 23rd Street (Number and street)

New York (City) 10 (Zone) N. Y. (State)

TURN THIS PAGE

6. Name ..... Address .....

7. Describe the work briefly Metal Pin

8. Principal material of which made Tin Alloy or other material

9. Longest dimension in inches Approximately 3"

10. (*a*) Wording of copyright notice appearing on work (C) Boucher

Location of notice Stamped on back of pin

(*b*) If name of copyright owner appears elsewhere than in notice, give wording

Location of name

11. Indicate by check if Option A or B stated in the instructions given below is selected. ***If there is no check, it will be assumed that OPTION C, in which photographs but no copies are deposited, is desired.***

Option A ☐ **Option B** ☒

* * * *

INSTRUCTIONS FOR SECURING REGISTRATION OF COPYRIGHT IN A PUBLISHED THREE-DIMENSIONAL WORK OF ART

All applications for copyright registration of published three-dimensional works of art in Class G shall be accompanied by as many photographs, in black and white or in color, as are necessary to identify the work. Each photograph shall not be larger than 9 by 12 inches, but preferably shall be 8 by 10 inches, nor shall it present an image of the work smaller than 4 inches in its greatest dimension. The title of the work shall appear on each photograph.

In addition to the photographs, application on Form GG, and the statutory registration fee, each applicant shall select and comply with one of the following options:

OPTION "A"

Send two copies of the best edition of the work (or one copy, if by a foreign author and published in a foreign country).

The Copyright Office will retain the copies for disposition in accordance with its usual practice.

OPTION "B"

Send two copies of the best edition of the work (or one copy, if by a foreign author and published in a foreign country) *and in addition* mark the package with the special label supplied by the Copyright Office or by the use of other appropriate means indicating that Option "B" has been chosen.

The Copyright Office will promptly return the copies to the copyright claimant or to his agent, at an address within the United States at his expense.

OPTION "C"

Send no copies of the work. If Option "C" is selected, the Copyright Office will issue its certificate, bearing a notation that photographs were accepted in place of copies, but expresses no opinion as to the need for, or possible effect of delay in, making deposit of copies prior to suit for infringement of copyright.

U. S. GOVERNMENT PRINTING OFFICE 16—63904-1

Plaintiffs' Exh. No. 16

AGE 1a

Additional Certificate (17 U.S.C. 215)

CERTIFICATE OF REGISTRATION

OF A CLAIM TO COPYRIGHT IN A PUBLISHED THREE-DIMENSIONAL WORK OF ART

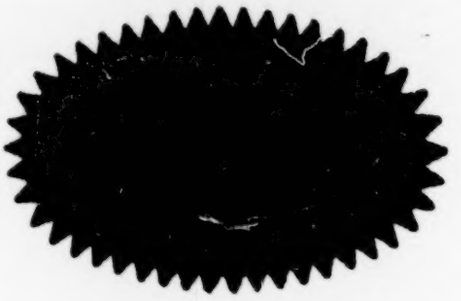
REGISTRATION NO. G pub. 7109

CLASS G

THIS IS TO CERTIFY that the following statements for the work herein named have been made a part of the records of the Copyright Office. In witness whereof the seal of the Copyright Office is hereto affixed.

William Tilke

Register of Copyrights
United States of America



1. COPYRIGHT CLAIMANT OR CLAIMANTS (Full NAMES and ADDRESSES):

Marcel Boucher d/b/a Boucher

304 East 23rd Street, New York 10, N. Y.

2. TITLE OF WORK Necklace-Style No. 5831

3. AUTHOR (The word "author" includes an employer in the case of works made for hire). Full name and pseudonym, if any, are requested for cataloging purposes. Citizenship *must* be given.

Name Marcel (First) (Middle) Boucher (Last) Citizenship U.S. (Country)

Domicile 4143 Richmond Avenue, Eltingville, S.I., N. Y. (Address)

4. PUBLISHER AND DATE:

(*a*) Published by Marcel Boucher et Cie (Name) at New York City (Place)

(*b*) Date first placed on sale, sold, or publicly distributed 6 14 1954 (Month, day, and year)

DATES OF RECEIPT IN COPYRIGHT OFFICE			
APPLICATION	SEPT	21	1954
ONE COPY			
TWO COPIES	SEPT	21	1954
2 PHOTOGRAPH	SEPT	21	1954
FEE			

16—68904-1

5. SEND CERTIFICATE TO: (If refund or other communications are to be sent to another person, give his name in space 6.)

Name Marcel Boucher et Cie

Address 304 East 23rd Street (Number and street)

New York (City) 10 (Zone) N. Y. (State)

TURN THIS PAGE

6. Name ..... Address .....

Plaintiffs' Exh. No. 16

7. Describe the work briefly Metal Necklace

8. Principal material of which made Tin Alloy or other material

9. Longest dimension in inches Approximately 15"

10. (*a*) Wording of copyright notice appearing on work (C) Boucher

Location of notice Stamped on back of necklace

(*b*) If name of copyright owner appears elsewhere than in notice, give wording

Location of name

11. Indicate by check if Option A or B stated in the instructions given below is selected. ***If there is no check, it will be assumed that OPTION C, in which photographs but no copies are deposited, is desired.***

Option A ☐ **Option B** ☒

* * * *

INSTRUCTIONS FOR SECURING REGISTRATION OF COPYRIGHT IN A PUBLISHED THREE-DIMENSIONAL WORK OF ART

All applications for copyright registration of published three-dimensional works of art in Class G shall be accompanied by as many photographs, in black and white or in color, as are necessary to identify the work. Each photograph shall not be larger than 9 by 12 inches, but preferably shall be 8 by 10 inches, nor shall it present an image of the work smaller than 4 inches in its greatest dimension. The title of the work shall appear on each photograph.

In addition to the photographs, application on Form GG, and the statutory registration fee, each applicant shall select and comply with one of the following options:

OPTION "A"

Send two copies of the best edition of the work (or one copy, if by a foreign author and published in a foreign country).

The Copyright Office will retain the copies for disposition in accordance with its usual practice.

OPTION "B"

Send two copies of the best edition of the work (or one copy, if by a foreign author and published in a foreign country) *and in addition* mark the package with the special label supplied by the Copyright Office or by the use of other appropriate means indicating that Option "B" has been chosen.

The Copyright Office will promptly return the copies to the copyright claimant or to his agent, at an address within the United States at his expense.

OPTION "C"

Send no copies of the work. If Option "C" is selected, the Copyright Office will issue its certificate, bearing a notation that photographs were accepted in place of copies, but expresses no opinion as to the need for, or possible effect of delay in, making deposit of copies prior to suit for infringement of copyright.

U. S. GOVERNMENT PRINTING OFFICE 16—63904-1

Plaintiffs' Exh. No. 19

Additional Certificate (17 U.S.C. 215)

CERTIFICATE OF REGISTRATION

OF A CLAIM TO COPYRIGHT IN A PUBLISHED THREE-DIMENSIONAL WORK OF ART

REGISTRATION NO. G pub. 7849

CLASS G

THIS IS TO CERTIFY that the following statements for the work herein named have been made a part of the records of the Copyright Office. In witness whereof the seal of the Copyright Office is hereto affixed.

Register of Copyrights
United States of America

1. COPYRIGHT CLAIMANT OR CLAIMANTS (Full NAMES and ADDRESSES):

MARCEL BOUCHER D/B/A BOUCHER

304 EAST 23rd STREET, NEW YORK 10, N.Y.

2. TITLE OF WORK EARRING-STYLE NO.-5917

3. AUTHOR (The word "author" includes an employer in the case of works made for hire). Full name and pseudonym, if any, are requested for cataloging purposes. Citizenship *must* be given.

Name MARCEL (First) BOUCHER (Middle) (Last) Citizenship U.S. (Country)

Domicile 4143 RICHMOND AVENUE ELTINGVILLE, S.I., N.Y. (Address)

4. PUBLISHER AND DATE:

(a) Published by MARCEL BOUCHER ET CIE (Name) at NEW YORK CITY (Place)

(b) Date first placed on sale, sold, or publicly distributed 1 2 55 (Month, day, and year)

DATES OF RECEIPT IN COPYRIGHT OFFICE	
APPLICATION	MAR 9 1955
ONE COPY	
TWO COPIES	MAR 9 1955
2 PHOTOGRAPH	MAR 9 1955
FEE	

5. SEND CERTIFICATE TO: (If refund or other communications are to be sent to another person, give his name in space 6.)

Name MARCEL BOUCHER ET CIE

Address 304 EAST 23rd STREET (Number and street)

NEW YORK 10 N.Y. (City) (Zone) (State)

16—63904-1

TURN THIS PAGE

6. Name ..... Address .....

7. Describe the work briefly METAL EARRING

8. Principal material of which made TIN ALLOY OR OTHER MATERIALS

9. Longest dimension in inches APPROXIMATELY 1"

10. (*a*) Wording of copyright notice appearing on work (C) BOUCHER

Location of notice STAMPED ON BACK OF EARRING

(*b*) If name of copyright owner appears elsewhere than in notice, give wording

Location of name

11. Indicate by check if Option A or B stated in the instructions given below is selected. ***If there is no check, it will be assumed that OPTION C, in which photographs but no copies are deposited, is desired.***

Option A ☐ **Option B** ☒

* * * *

INSTRUCTIONS FOR SECURING REGISTRATION OF COPYRIGHT IN A PUBLISHED THREE-DIMENSIONAL WORK OF ART

All applications for copyright registration of published three-dimensional works of art in Class G shall be accompanied by as many photographs, in black and white or in color, as are necessary to identify the work. Each photograph shall not be larger than 9 by 12 inches, but preferably shall be 8 by 10 inches, nor shall it present an image of the work smaller than 4 inches in its greatest dimension. The title of the work shall appear on each photograph.

In addition to the photographs, application on Form GG, and the statutory registration fee, each applicant shall select and comply with one of the following options:

OPTION "A"

Send two copies of the best edition of the work (or one copy, if by a foreign author and published in a foreign country).

The Copyright Office will retain the copies for disposition in accordance with its usual practice.

OPTION "B"

Send two copies of the best edition of the work (or one copy, if by a foreign author and published in a foreign country) *and in addition* mark the package with the special label supplied by the Copyright Office or by the use of other appropriate means indicating that Option "B" has been chosen.

The Copyright Office will promptly return one copies to the copyright claimant or to his agent, at an address within the United States at his expense.

OPTION "C"

Send no copies of the work. If Option "C" is selected, the Copyright Office will issue its certificate, bearing a notation that photographs were accepted in place of copies, but expresses no opinion as to the need for, or possible effect of delay in, making deposit of copies prior to suit for infringement of copyright.

U. S. GOVERNMENT PRINTING OFFICE 16—63904-1

PAGE 1a

Additional Certificate (17 U.S.C 213)

CERTIFICATE OF REGISTRATION

OF A CLAIM TO COPYRIGHT IN A PUBLISHED THREE-DIMENSIONAL WORK OF ART

REGISTRATION NO. G pub. 7855 CLASS G

THIS IS TO CERTIFY that the following statements for the work herein named have been made a part of the records of the Copyright Office. In witness whereof the seal of the Copyright Office is hereto affixed.

Register of Copyrights
United States of America

1. COPYRIGHT CLAIMANT OR CLAIMANTS (Full NAMES and ADDRESSES):

MARCEL BOUCHER D/B/A BOUCHER

304 EAST 23rd STREET, NEW YORK 10, N.Y.

2. TITLE OF WORK PIN-STYLE NO.-5928

3. AUTHOR (The word "author" includes an employer in the case of works made for hire). Full name and pseudonym, if any, are requested for cataloging purposes. Citizenship *must* be given.

Name MARCEL (First) BOUCHER (Middle) (Last) Citizenship U.S. (Country)

Domicile 4143 RICHMOND AVENUE, ELTINGVILLE, S.I., N.Y. (Address)

4. PUBLISHER AND DATE:

(a) Published by MARCEL BOUCHER ET CIE (Name) at NEW YORK CITY (Place)

(b) Date first placed on sale, sold, or publicly distributed 1 2 55 (Month, day, and year)

DATES OF RECEIPT IN COPYRIGHT OFFICE			
APPLICATION	MAR	9	1955
ONE COPY			
TWO COPIES	MAR	9	1955
2 PHOTOGRAPH	MAR	9	1955
FEE			

16—63904-1

5. SEND CERTIFICATE TO: (If refund or other communications are to be sent to another person, give his name in space 6.)

Name MARCEL BOUCHER ET CIE

Address 304 EAST 23rd STREET (Number and street)

NEW YORK (City) 10 (Zone) N.Y. (State)

TURN THIS PAGE

6. Name ..... Address .....

7. Describe the work briefly METAL PIN

8. Principal material of which made TIN ALLOY OR OTHER MATERIAL

9. Longest dimension in inches APPROXIMATELY 2 1/2"

10. (*a*) Wording of copyright notice appearing on work (C) BOUCHER

Location of notice STAMPED ON BACK OF PIN

(*b*) If name of copyright owner appears elsewhere than in notice, give wording

Location of name

11. Indicate by check if Option A or B stated in the instructions given below is selected. ***If there is no check, it will be assumed that OPTION C, in which photographs but no copies are deposited, is desired.***

Option A ☐ **Option B** ☒

* * * *

INSTRUCTIONS FOR SECURING REGISTRATION OF COPYRIGHT IN A PUBLISHED THREE-DIMENSIONAL WORK OF ART

All applications for copyright registration of published three-dimensional works of art in Class G shall be accompanied by as many photographs, in black and white or in color, as are necessary to identify the work. Each photograph shall not be larger than 9 by 12 inches, but preferably shall be 8 by 10 inches, nor shall it present an image of the work smaller than 4 inches in its greatest dimension. The title of the work shall appear on each photograph.

In addition to the photographs, application on Form GG, and the statutory registration fee, each applicant shall select and comply with one of the following options:

OPTION "A"

Send two copies of the best edition of the work (or one copy, if by a foreign author and published in a foreign country).

The Copyright Office will retain the copies for disposition in accordance with its usual practice.

OPTION "B"

Send two copies of the best edition of the work (or one copy, if by a foreign author and published in a foreign country) *and in addition* mark the package with the special label supplied by the Copyright Office or by the use of other appropriate means indicating that Option "B" has been chosen.

The Copyright Office will promptly return the copies to the copyright claimant or to his agent, at an address within the United States at his expense.

OPTION "C"

Send no copies of the work. If Option "C" is selected, the Copyright Office will issue its certificate, bearing a notation that photographs were accepted in place of copies, but expresses no opinion as to the need for, or possible effect of delay in, making deposit of copies prior to suit for infringement of copyright.

U. S. GOVERNMENT PRINTING OFFICE 16—63904-1

Plaintiffs' Exh. No. 24

Additional Certificate (17 U.S.C. 215)

CERTIFICATE OF REGISTRATION

OF A CLAIM TO COPYRIGHT IN A PUBLISHED THREE-DIMENSIONAL WORK OF ART

REGISTRATION NO. G pub. 7856

CLASS G

THIS IS TO CERTIFY that the following statements for the work herein named have been made a part of the records of the Copyright Office. In witness whereof the seal of the Copyright Office is hereto affixed.

Register of Copyrights
United States of America

1. COPYRIGHT CLAIMANT OR CLAIMANTS (Full NAMES and ADDRESSES):

MARCEL BOUCHER D/B/A BOUCHER

304 EAST 23rd STREET, NEW YORK 10, N.Y.

2. TITLE OF WORK PIN-STYLE NO.-5929

3. AUTHOR (The word "author" includes an employer in the case of works made for hire). Full name and pseudonym, if any, are requested for cataloging purposes. Citizenship *must* be given.

Name MARCEL (First) (Middle) BOUCHER (Last) Citizenship U.S. (Country)

Domicile 4143 RICHMOND AVENUE, ELTINGVILLE, S.I., N.Y. (Address)

4. PUBLISHER AND DATE:

(a) Published by MARCEL BOUCHER ET CIE (Name) at NEW YORK CITY (Place)

(b) Date first placed on sale, sold, or publicly distributed 1 2 55 (Month, day, and year)

DATES OF RECEIPT IN COPYRIGHT OFFICE	
APPLICATION	MAR 9 1955
ONE COPY	
TWO COPIES	MAR 9 1955
PHOTOGRAPH	MAR 9 1955
FEE	

5. SEND CERTIFICATE TO: (If refund or other communications are to be sent to another person, give his name in space 6.)

Name MARCEL BOUCHER ET CIE

Address 304 EAST 23rd STREET (Number and street)

NEW YORK (City) 10 (Zone) N.Y. (State)

TURN THIS PAGE

6. Name ..... Address .....

16—68904-1

Plaintiffs' Exh. No. 24

7. Describe the work briefly METAL PIN

8. Principal material of which made TIN ALLOY OR OTHER MATERIAL

9. Longest dimension in inches APPROXIMATELY 1 1/2"

10. (*a*) Wording of copyright notice appearing on work (C) BOUCHER

Location of notice STAMPED ON BACK OF PIN

(*b*) If name of copyright owner appears elsewhere than in notice, give wording

Location of name

11. Indicate by check if Option A or B stated in the instructions given below is selected. ***If there is no check, it will be assumed that OPTION C, in which photographs but no copies are deposited, is desired.***

Option A ☐ **Option B** ☒

* * * *

INSTRUCTIONS FOR SECURING REGISTRATION OF COPYRIGHT IN A PUBLISHED THREE-DIMENSIONAL WORK OF ART

All applications for copyright registration of published three-dimensional works of art in Class G shall be accompanied by as many photographs, in black and white or in color, as are necessary to identify the work. Each photograph shall not be larger than 9 by 12 inches, but preferably shall be 8 by 10 inches, nor shall it present an image of the work smaller than 4 inches in its greatest dimension. The title of the work shall appear on each photograph.

In addition to the photographs, application on Form GG, and the statutory registration fee, each applicant shall select and comply with one of the following options:

OPTION "A"

Send two copies of the best edition of the work (or one copy, if by a foreign author and published in a foreign country).

The Copyright Office will retain the copies for disposition in accordance with its usual practice.

OPTION "B"

Send two copies of the best edition of the work (or one copy, if by a foreign author and published in a foreign country) *and in addition* mark the package with the special label supplied by the Copyright Office or by the use of other appropriate means indicating that Option "B" has been chosen.

The Copyright Office will promptly return the copies to the copyright claimant or to his agent, at an address within the United States at his expense.

OPTION "C"

Send no copies of the work. If Option "C" is selected, the Copyright Office will issue its certificate, bearing a notation that photographs were accepted in place of copies, but expresses no opinion as to the need for, or possible effect of delay in, making deposit of copies prior to suit for infringement of copyright.

U. S. GOVERNMENT PRINTING OFFICE 16—63904-1

Plaintiffs' Exh. No. 30

Additional Certificate (17 U.S.C. 215)

CERTIFICATE OF REGISTRATION

OF A CLAIM TO COPYRIGHT IN A PUBLISHED THREE-DIMENSIONAL WORK OF ART

REGISTRATION NO. G pub. 7866

CLASS G

THIS IS TO CERTIFY that the following statements for the work herein named have been made a part of the records of the Copyright Office. In witness whereof the seal of the Copyright Office is hereto affixed.

Register of Copyrights
United States of America

1. COPYRIGHT CLAIMANT OR CLAIMANTS (Full NAMES and ADDRESSES):

MARCEL BOUCHER D/B/A BOUCHER

304 EAST 23rd STREET, NEW YORK 10, N.Y.

2. TITLE OF WORK PIN-STYLE NO.-5947

3. AUTHOR (The word "author" includes an employer in the case of works made for hire). Full name and pseudonym, if any, are requested for cataloging purposes. Citizenship *must* be given.

Name MARCEL (First) BOUCHER (Middle) (Last) Citizenship U.S. (Country)

Domicile 4143 RICHMOND AVENUE, ELTINGVILLE, S.I., N.Y. (Address)

4. PUBLISHER AND DATE:

(a) Published by MARCEL BOUCHER ET CIE (Name) at NEW YORK CITY (Place)

(b) Date first placed on sale, sold, or publicly distributed 1 2 55 (Month, day, and year)

DATES OF RECEIPT IN COPYRIGHT OFFICE	
APPLICATION	MAR 9 1955
ONE COPY	
TWO COPIES	MAR 9 1955
2 PHOTOGRAPH	MAR 9 1955
FEE	

5. SEND CERTIFICATE TO: (If refund or other communications are to be sent to another person, give his name in space 6.)

Name MARCEL BOUCHER ET CIE

Address 304 EAST 23rd STREET (Number and street)

NEW YORK 10 N.Y. (City) (Zone) (State)

16—68904-1

TURN THIS PAGE

6. Name ..... Address .....

7. Describe the work briefly METAL PIN

8. Principal material of which made TIN ALLOY OR OTHER MATERIAL

9. Longest dimension in inches APPROXIMATELY 2"

10. (a) Wording of copyright notice appearing on work (C) BOUCHER

Location of notice STAMPED ON BACK OF PIN

(b) If name of copyright owner appears elsewhere than in notice, give wording

Location of name

11. Indicate by check if Option A or B stated in the instructions given below is selected. ***If there is no check, it will be assumed that OPTION C, in which photographs but no copies are deposited, is desired.***

Option A ☐ **Option B** ☒

* * * *

INSTRUCTIONS FOR SECURING REGISTRATION OF COPYRIGHT IN A PUBLISHED THREE-DIMENSIONAL WORK OF ART

All applications for copyright registration of published three-dimensional works of art in Class G shall be accompanied by as many photographs, in black and white or in color, as are necessary to identify the work. Each photograph shall not be larger than 9 by 12 inches, but preferably shall be 8 by 10 inches, nor shall it present an image of the work smaller than 4 inches in its greatest dimension. The title of the work shall appear on each photograph.

In addition to the photographs, application on Form GG, and the statutory registration fee, each applicant shall select and comply with one of the following options:

OPTION "A"

Send two copies of the best edition of the work (or one copy, if by a foreign author and published in a foreign country).

The Copyright Office will retain the copies for disposition in accordance with its usual practice.

OPTION "B"

Send two copies of the best edition of the work (or one copy, if by a foreign author and published in a foreign country) *and in addition* mark the package with the special label supplied by the Copyright Office or by the use of other appropriate means indicating that Option "B" has been chosen.

The Copyright Office will promptly return the copies to the copyright claimant or to his agent, at an address within the United States at his expense.

OPTION "C"

Send no copies of the work. If Option "C" is selected, the Copyright Office will issue its certificate, bearing a notation that photographs were accepted in place of copies, but expresses no opinion as to the need for, or possible effect of delay in, making deposit of copies prior to suit for infringement of copyright.

U. S. GOVERNMENT PRINTING OFFICE 16—63004-1

Plaintiffs' Exh. No. 32

189a

PAGE 1a

Additional Certificate (17 U.S.C. 215)

CERTIFICATE OF REGISTRATION

OF A CLAIM TO COPYRIGHT IN A PUBLISHED THREE-DIMENSIONAL WORK OF ART

REGISTRATION NO. G pub. 7847

CLASS G

THIS IS TO CERTIFY that the following statements for the work herein named have been made a part of the records of the Copyright Office. In witness whereof the seal of the Copyright Office is hereto affixed.

Register of Copyrights
United States of America

1. COPYRIGHT CLAIMANT OR CLAIMANTS (Full NAMES and ADDRESSES):

MARCEL BOUCHER D/B/A BOUCHER

304 EAST 23rd STREET, NEW YORK 10, N.Y.

2. TITLE OF WORK NECKLACE-STYLE NO.-5913

3. AUTHOR (The word "author" includes an employer in the case of works made for hire). Full name and pseudonym, if any, are requested for cataloging purposes. Citizenship *must* be given.

Name MARCEL (First) (Middle) BOUCHER (Last) Citizenship U.S. (Country)

Domicile 4143 RICHMOND AVENUE, ELTINGVILLE, S.I., N.Y. (Address)

4. PUBLISHER AND DATE:

(a) Published by MARCEL BOUCHER ET CIE (Name) at NEW YORK CITY (Place)

(b) Date first placed on sale, sold, or publicly distributed 1 2 55 (Month, day, and year)

DATES OF RECEIPT IN COPYRIGHT OFFICE		
APPLICATION		
MAR	9	1955
ONE COPY		
TWO COPIES		
MAR	9	1955
2 PHOTOGRAPH		
MAR	9	1955
FEE		

5. SEND CERTIFICATE TO: (If refund or other communications are to be sent to another person, give his name in space 6.)

Name MARCEL BOUCHER ET CIE

Address 304 EAST 23rd STREET (Number and street)

NEW YORK 10 N.Y. (City) (Zone) (State)

TURN THIS PAGE

6. Name ..... Address .....

16—63904-1

7. Describe the work briefly METAL NECKLACE

8. Principal material of which made TIN ALLOY OR OTHER MATERIAL

9. Longest dimension in inches APPROXIMATELY 13"

10. (*a*) Wording of copyright notice appearing on work (C) BOUCHER

Location of notice STAMPED ON BACK OF NECKLACE

(*b*) If name of copyright owner appears elsewhere than in notice, give wording

Location of name

11. Indicate by check if Option A or B stated in the instructions given below is selected. ***If there is no check, it will be assumed that OPTION C, in which photographs but no copies are deposited, is desired.***

Option A ☐ **Option B** ☒

* * * *

INSTRUCTIONS FOR SECURING REGISTRATION OF COPYRIGHT IN A PUBLISHED THREE-DIMENSIONAL WORK OF ART

All applications for copyright registration of published three-dimensional works of art in Class G shall be accompanied by as many photographs, in black and white or in color, as are necessary to identify the work. Each photograph shall not be larger than 9 by 12 inches, but preferably shall be 8 by 10 inches, nor shall it present an image of the work smaller than 4 inches in its greatest dimension. The title of the work shall appear on each photograph.

In addition to the photographs, application on Form GG, and the statutory registration fee, each applicant shall select and comply with one of the following options:

OPTION "A"

Send two copies of the best edition of the work (or one copy, if by a foreign author and published in a foreign country).

The Copyright Office will retain the copies for disposition in accordance with its usual practice.

OPTION "B"

Send two copies of the best edition of the work (or one copy, if by a foreign author and published in a foreign country) *and in addition* mark the package with the special label supplied by the Copyright Office or by the use of other appropriate means indicating that Option "B" has been chosen.

The Copyright Office will promptly return the copies to the copyright claimant or to his agent, at an address within the United States at his expense.

OPTION "C"

Send no copies of the work. If Option "C" is selected, the Copyright Office will issue its certificate, bearing a notation that photographs were accepted in place of copies, but expresses no opinion as to the need for, or possible effect of delay in, making deposit of copies prior to suit for infringement of copyright.

U. S. GOVERNMENT PRINTING OFFICE 16—62806-1

Plaintiffs' Exh. No. 35

Additional Certificate (17 U.S.C 215)

CERTIFICATE OF REGISTRATION

OF A CLAIM TO COPYRIGHT IN A PUBLISHED THREE-DIMENSIONAL WORK OF ART

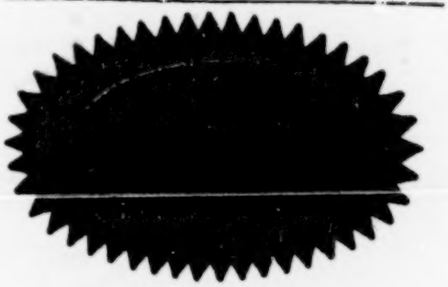
REGISTRATION NO. G pub. 7850

CLASS G

THIS IS TO CERTIFY that the following statements for the work herein named have been made a part of the records of the Copyright Office. In witness whereof the seal of the Copyright Office is hereto affixed.

William Pate

Register of Copyrights
United States of America



1. COPYRIGHT CLAIMANT OR CLAIMANTS (Full NAMES and ADDRESSES):

MARCEL BOUCHER D/B/A BOUCHER

304 EAST 23rd STREET, NEW YORK 10, N.Y.

2. TITLE OF WORK PIN-STYLE NO.-5919

3. AUTHOR (The word "author" includes an employer in the case of works made for hire). Full name and pseudonym, if any, are requested for cataloging purposes. Citizenship *must* be given.

Name MARCEL (First) BOUCHER (Middle) (Last) Citizenship U.S. (Country)

Domicile 4143 RICHMOND AVENUE, ELTINGVILLE, S.I., N.Y. (Address)

4. PUBLISHER AND DATE:

(a) Published by MARCEL BOUCHER ET CIE (Name) at NEW YORK CITY (Place)

(b) Date first placed on sale, sold, or publicly distributed 1 2 55 (Month, day, and year)

DATES OF RECEIPT IN COPYRIGHT OFFICE	
APPLICATION	MAR 9 1955
ONE COPY	
TWO COPIES	MAR 9 1955
2 PHOTOGRAPH	MAR 9 1955
FEE	

5. SEND CERTIFICATE TO: (If refund or other communications are to be sent to another person, give his name in space 6.)

Name MARCEL BOUCHER ET CIE

Address 304 EAST 23rd STREET (Number and street)

NEW YORK 10 N.Y. (City) (Zone) (State)

16—62904-1

TURN THIS PAGE

6. Name ..... Address .....

7. Describe the work briefly METAL PIN

8. Principal material of which made TIN ALLOY OR OTHER MATERIAL

9. Longest dimension in inches APPROXIMATELY 2"

10. (*a*) Wording of copyright notice appearing on work (C) BOUCHER

Location of notice STAMPED ON BACK OF PIN

(*b*) If name of copyright owner appears elsewhere than in notice, give wording

Location of name

11. Indicate by check if Option A or B stated in the instructions given below is selected. ***If there is no check, it will be assumed that OPTION C, in which photographs but no copies are deposited, is desired.***

Option A ☐ **Option B** ☒

* * * *

INSTRUCTIONS FOR SECURING REGISTRATION OF COPYRIGHT IN A PUBLISHED THREE-DIMENSIONAL WORK OF ART

All applications for copyright registration of published three-dimensional works of art in Class G shall be accompanied by as many photographs, in black and white or in color, as are necessary to identify the work. Each photograph shall not be larger than 9 by 12 inches, but preferably shall be 8 by 10 inches, nor shall it present an image of the work smaller than 4 inches in its greatest dimension. The title of the work shall appear on each photograph.

In addition to the photographs application on Form GG, and the statutory registration fee, each applicant shall select and comply with one of the following options:

OPTION "A"

Send two copies of the best edition of the work (or one copy, if by a foreign author and published in a foreign country).

The Copyright Office will retain the copies for disposition in accordance with its usual practice.

OPTION "B"

Send two copies of the best edition of the work (or one copy, if by a foreign author and published in a foreign country) *and in addition* mark the package with the special label supplied by the Copyright Office or by the use of other appropriate means indicating that Option "B" has been chosen.

The Copyright Office will promptly return the copies to the copyright claimant or to his agent, at an address within the United States at his expense.

OPTION "C"

Send no copies of the work. If Option "C" is selected, the Copyright Office will issue its certificate, bearing a notation that photographs were accepted in place of copies, but expresses no opinion as to the need for, or possible effect of delay in, making deposit of copies prior to suit for infringement of copyright.

U. S. GOVERNMENT PRINTING OFFICE 16—63804-2

Plaintiffs' Exh. No. 38

Additional Certificate (17 U.S.C. 213)

193a

CERTIFICATE OF REGISTRATION

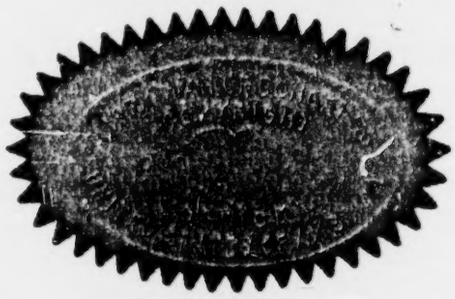
OF A CLAIM TO COPYRIGHT IN A PUBLISHED THREE-DIMENSIONAL WORK OF ART

REGISTRATION NO. G pub. 7851

CLASS G

THIS IS TO CERTIFY that the following statements for the work herein named have been made a part of the records of the Copyright Office. In witness whereof the seal of the Copyright Office is hereto affixed.

William Filz
Register of Copyrights
United States of America



1. COPYRIGHT CLAIMANT OR CLAIMANTS (Full NAMES and ADDRESSES):

MARCEL BOUCHER D/B/A BOUCHER

304 EAST 23rd STREET, NEW YORK 10, N.Y.

2. TITLE OF WORK EARRING-STYLE NO.-5920

3. AUTHOR (The word "author" includes an employer in the case of works made for hire). Full name and pseudonym, if any, are requested for cataloging purposes. Citizenship *must* be given.

Name MARCEL (First) BOUCHER (Middle) (Last) Citizenship U.S. (Country)

Domicile 4143 RICHMOND AVENUE, ELTINGVILLE, S.I., N.Y. (Address)

4. PUBLISHER AND DATE:

(a) Published by MARCEL BOUCHER ET CIE (Name) at NEW YORK CITY (Place)

(b) Date first placed on sale, sold, or publicly distributed 1 2 55 (Month, day, and year)

DATES OF RECEIPT IN COPYRIGHT OFFICE	
APPLICATION	MAR 9 1955
ONE COPY	
TWO COPIES	MAR 9 1955
2 PHOTOGRAPH	MAR 9 1955
FEE	

5. SEND CERTIFICATE TO: (If refund or other communications are to be sent to another person, give his name in space 6.)

Name MARCEL BOUCHER ET CIE

Address 304 EAST 23rd STREET (Number and street)

NEW YORK 10 N.Y. (City) (Zone) (State)

TURN THIS PAGE

Address

16—63904-1

7. Describe the work briefly METAL EARRING

8. Principal material of which made TIN ALLOY OR OTHER MATERIAL

9. Longest dimension in inches APPROXIMATELY 1 1/4"

10. (*a*) Wording of copyright notice appearing on work (C) BOUCHER

Location of notice STAMPED ON BACK OF EARRING

(*b*) If name of copyright owner appears elsewhere than in notice, give wording

Location of name

11. Indicate by check if Option A or B stated in the instructions given below is selected. ***If there is no check, it will be assumed that OPTION C, in which photographs but no copies are deposited, is desired.***

Option A ☐ **Option B** ☒

* * * *

INSTRUCTIONS FOR SECURING REGISTRATION OF COPYRIGHT IN A PUBLISHED THREE-DIMENSIONAL WORK OF ART

All applications for copyright registration of published three-dimensional works of art in Class G shall be accompanied by as many photographs, in black and white or in color, as are necessary to identify the work. Each photograph shall not be larger than 9 by 12 inches, but preferably shall be 8 by 10 inches, nor shall it present an image of the work smaller than 4 inches in its greatest dimension. The title of the work shall appear on each photograph.

In addition to the photographs, application on Form GG, and the statutory registration fee, each applicant shall select and comply with one of the following options:

OPTION "A"

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The Copyright Office will retain the copies for disposition in accordance with its usual practice.

OPTION "B"

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The Copyright Office will promptly return the copies to the copyright claimant or to his agent, at an address within the United States at his expense.

OPTION "C"

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U. S. GOVERNMENT PRINTING OFFICE 16—63004-1

MARCEL BOUCHER ET CIE

JEWELRY DESIGNERS & MANUFACTURERS

GRAMERCY 3-4470
GRAMERCY 3-4474

304-10 EAST 23rd STREET
NEW YORK, N. Y.

MARBOUX INC.
304 EAST 23 ST. - NEW YORK 10, N.Y.

ORDER NO. 9518 DATE 1/12/55

M

SHIP TO DEPT.

196a

Defendants' Exh. No. J

SEE A FACTORY
304 EAST 23RD ST.
NEW YORK 10, N. Y.
GR 3-4470-1

MARBOUX JEWELRY

DISTRIBUTED BY
MARCEL BOUCHER ET CIE

SHOWROOMS: • NEW YORK CITY • CHICAGO, ILL. • LOS ANGELES, CAL.

DATE 8/30/55
INVOICE NO. X 01679
SALESMAN: BURNS

TERMS: 9-10 E. O. M.
NET 30 DAYS

THE FAMOUS
IGH & COURT STREET
PORTSMOUTH, VA.

SHIPPED VIA: NATL. PACK. ORDER NO: 6008-7 YOUR DEPT. NO: 72 OUR ORDER NO: 2049

STYLE NO. AND DESCRIPTION	QUANTITY	PER DOZ PRICE	AMOUNT	TOTAL
221 PIN	1/3 DZ	13.50	4.50	
220 EAR	1/2 DZ	13.50	6.75	
213 PIN	1/3 DZ	13.50	4.50	
214 EAR	1/2 DZ	13.50	6.75	
215 EAR	1/2 DZ	13.50	6.75	
208 EAR	1/2 DZ	13.50	6.75	
206 EAR	1/2 DZ	13.50	6.75	
218 EAR	1/6 DZ	13.50	2.25	
217 EAR	1/4 DZ	13.50	3.38	
216 PIN	1/4 DZ	13.50	3.38	
6104 PIN	1/4 DZ	24.00	6.00	
6108 EAR	1/3 DZ	24.00	8.00	
18089 NOT 18085 NECK	1/4 DZ	18.00	4.50	
18090 NOT 18086 EAR	1/4 DZ	6.75	1.69	
15001 NECK	1/3 DZ	18.00	6.00	
15003 BRAC	1/6 DZ	13.50	2.25	
15004 EAR	1/2 DZ	6.75	3.38	
				83.50

AUG 31 1955

PLEASE SHOW OUR INVOICE NO. ON YOUR CHECK TO BE MAILED TO
MARCEL BOUCHER ET CIE. 304 EAST 23RD STREET, NEW YORK 10, N. Y.

Defendants' Exh. No. J

& FACTORY
304 EAST 23rd ST.
NEW YORK 10, N. Y.
GR 3-4470-1

MARBOUX JEWELRY

DISTRIBUTED BY

MARCEL BOUCHER ET CIE

SHOWROOMS: • NEW YORK CITY • CHICAGO, ILL. • LOS ANGELES, CAL.

DATE 8/29/55

INVOICE No. X01682

SALESMAN: HOUSE

TERMS: 3—10 E. O. M.
NET 30 DAYS

BLOOMINGDALE BROS.
LEXINGTON & 59th STREET
NEW YROK CITY, N.Y.

SHIPPED VIA: MESS: ORDER No: 202185-86 YOUR DEPT. No: 1[illegible] OUR ORDER No: 2811

	STYLE NO. AND DESCRIPTION		QUANTITY	PRICE PER DOZ	AMOUNT	TOTAL
209	PIN	6	DZ	13.50	81.00	
210	EAR	6	DZ	13.50	81.00	
213	PIN	4	DZ	13.50	54.00	
214	EAR	4	DZ	13.50	54.00	
206	EAR	4	DZ	13.50	54.00	
208	EAR	4	DZ	13.50	54.00	
221	PIN	2	DZ	13.50	27.00	
220	EAR	2	DZ	13.50	27.00	
						432.00

AUG 31 1955

PLEASE SHOW OUR INVOICE NO. ON YOUR CHECK TO BE MAILED TO
MARCEL BOUCHER ET CIE., 304 EAST 23RD STREET, NEW YORK 10, N. Y.

198a Defendants' Exh. No. J

FACTORY
304 EAST 23RD ST.
NEW YORK 10, N. Y.
GR 3-1470-1

MARBOUX JEWELRY

DISTRIBUTED BY
MARCEL BOUCHER ET CIE

SHOWROOMS: • NEW YORK CITY • CHICAGO, ILL. • LOS ANGELES, CAL.

DATE 8/30/55
INVOICE NO. X01684
SALESMAN: HOUSE

TERMS: 3-10 E. O. M.
NET 30 DAYS

HAHNE & CO.
54 HALSEY STREET
NEWARK, N.J.

SHIPPED VIA: PP | ORDER NO: L 50048 | YOUR DEPT. NO: 16 | OUR ORDER NO: 2743

	STYLE NO. AND DESCRIPTION		QUANTITY	PER PRICE DOZ	AMOUNT	TOTAL
206	EAR		1-1/2 DZ	13.50	20.25	
208	EAR		1-1/2 DZ	13.50	20.25	
210	EAR		1-1/2 DZ	13.50	20.25	
209	PIN		1-1/2 DZ	13.50	20.25	
533	NECK	(NOT @ $30)	1/3 DZ	36.00	12.00	
534	BRAC		1/3 DZ	30.00	10.00	
532	EAR		1/2 DZ	13.50	6.75	
						109.75
					PP CHGE	.73
						110.48

AUG 31 1955

PLEASE SHOW OUR INVOICE NO. ON YOUR CHECK TO BE MAILED TO MARCEL BOUCHER ET CIE., 304 EAST 23RD STREET, NEW YORK 10, N. Y.

[illegible]
[illegible] EAST 23RD ST.
NEW YORK 10, N. Y.
GR 3-4470-1

MARBOUX JEWELRY

DISTRIBUTED BY
MARCEL BOUCHER ET CIE

SHOWROOMS: • NEW YORK CITY • CHICAGO, ILL. • LOS ANGELES, CAL.

DATE 8/30/55
INVOICE NO. X 01685
SALESMAN: HOUSE

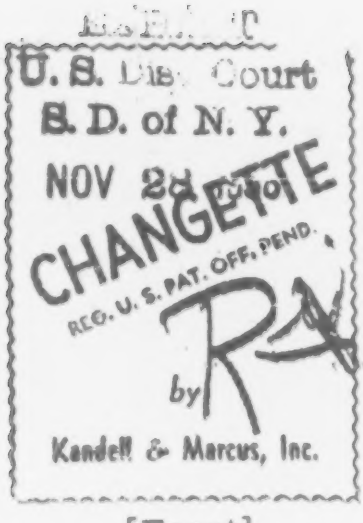
TERMS: 3-10 E. O. M.
NET 30 DAYS

ABRAHAM & STRAUSS
HEMPSTEAD, L.I. N.Y.

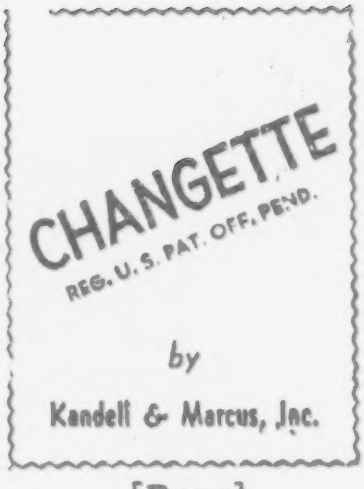
SHIPPED VIA: PP | ORDER NO: 491318 | YOUR DEPT. NO: 141-H | OUR ORDER NO: 3015

	STYLE NO. AND DESCRIPTION		QUANTITY	PRICE PER DOZ.	AMOUNT	TOTAL
	214	EAR	1 DZ	13.50	13.50	
	213	PIN	1/2 DZ	13.50	6.75	
	209	PIN	1/2 DZ	13.50	6.75	
	210	EAR	1/2 DZ	13.50	6.75	
	208	EAR	1/2 DZ	13.50	6.75	
	206	EAR	1/2 DZ	13.50	6.75	
	220	EAR	1/6 DZ	13.50	2.25	
	524	PIN	1/4 DZ	18.00	4.50	
	505	PIN	1/4 DZ	18.00	4.50	
	506	EAR	1/2 DZ	13.50	6.75	
	501	NECK	1/4 DZ	24.00	6.00	
	502	BRAC	1/6 DZ	24.00	4.00	
	509	NECK	1/6 DZ	36.00	6.00	
	511	BRAC	1/6 DZ	30.00	5.00	
	519	PIN	1/2 DZ	13.50	6.75	
	514	EAR	1/2 DZ	13.50	6.75	
	6101	NECK	1/12 DZ	75.00	6.25	
	6103	BRAC	1/12 DZ	60.00	5.00	
	6105	PIN	1/6 DZ	30.00	5.00	
	6104	PIN	1/4 DZ	24.00	6.00	
	6107	EAR	1/6 DZ	36.00	6.00	
	6108	EAR	1/3 DZ	24.00	8.00	
						136.00
			AUG 31 [illegible]		PP CHGE	.00
						136.00

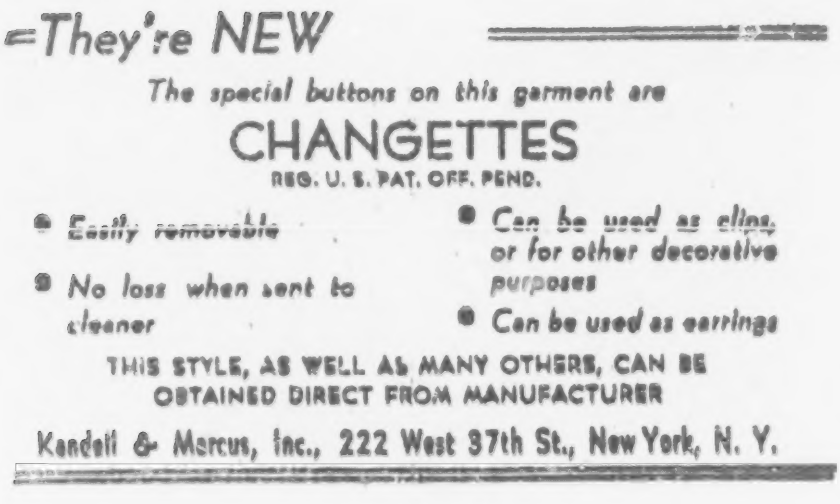
PLEASE SHOW OUR INVOICE NO. ON YOUR CHECK TO BE MAILED TO
MARCEL BOUCHER ET CIE., 304 EAST 23RD STREET, NEW YORK 10, N. Y.



[Front]



[Rear]



[Center]

[Excerpts from deposition of Marcel Boucher, Plaintiff, taken by Defendants January 23, 1956.]

[Page 58]

Q Mr. Boucher, pieces of costume jewelry without stones, are they known as "tailor made" items? A They usually are, yes.

MR. McGOVERN: "Tailored" or "tailor made"?

Q "Tailored" items? A Yes.

Q Would you say that by adding stones to the tailored items, that would make it a different style?

MR. KNAPP: Do you want the witness' opinion, Mr. Sparrow? Is that what you want?

A Are you asking for my opinion?

Q Yes. A Absolutely not. You know yourself that it's just the fact of trimming the design with a few stones; you are not changing the design.

Q Why did you put a different style number on it?

MR. KNAPP: I object to this.

A For identification of the item, that's all.

Q Would you say that you can make it more artistic if you put stones on an item? [59] A I wouldn't say that. Just a different type of merchandise, that's all.

Q It wouldn't make it more artistic? A It would make it more artistic, maybe. It's just a different type of merchandise. You have people who object to rhinestones for jewelry. You have --

MR. McGOVERN: Let the witness finish.

A (Continuing) You asked me for my opinion. There are many women who do not like rhinestones and who will spend just as much or more for a piece of costume jewelry plain as with rhinestones.

Q It depends on taste? A Upon tastes, that's right.

Q Would it depend on artistic discretion between one woman and another? A I would say that. Different tastes. We have some stores we can't sell rhinestones at all. They like all tailored merchandise.

Q Some stores will buy with the rhinestones and some without it? A That's right.

* * *

[62] Q What is the retail price of Exhibit 1?

MR. KNAPP: Off the record.

(Discussion off the record.)

Q You know what the retail price is, don't you, of Exhibit 1? A I don't know exactly.

Q Approximately, do you know what it is? A Oh, I would say $5 retail. But I'm not sure.

Q About how much are the earrings with the rhinestones? A I think, if I am not mistaken, $7.50. But you know why. We gold plate our jewelry, you understand. There is a big difference. We are not making the same type of jewelry.

Q What are the differences between the earrings reflected by Exhibit 1 without the rhinestones and the earrings with the rhinestones?

A When we put rhinestones on a piece of costume jewelry, all those rhinestones are set in rhodium plated metal. That is to say, we are using what we call a two-tone plating. That is, the piece is first plated in rhodium, which is quite an expensive plating.

Q That is with the rhinestones? A Yes. The piece is [63] first plated in rhodium. Then the part of the piece is masked where the stones are not set and the remainder of the piece is lacquered, and then the piece is plated with gold. You understand, that is a double operation. And for that reason, when it comes to low price items, we don't do that. On that particular case, that is the way the process is made.

* * *

[66] Q I want you to give me an answer. If you don't give it to me in price, I want to have it percentagewise. How much more in percentage do you charge for the necklace with the rhinestones as reflected in Exhibit 6, than for without the rhinestones?

A To give you an example, an item we would be selling at $30 a dozen plain, without any rhinestones, we sell the same item for approximately $45 a dozen.

Q Approximately. The same percentage runs through all of them? A That's right.

* * *

In Witness Whereof, I have this 9th day of August 19 54, made and signed this certificate.

Marcel Boucher

State of New York,
County of New York, } ss.:

On this 9th day of August, 19 54, before me personally appeared

Marcel Boucher

to me known and known to me to be the individual described in and who executed the foregoing certificate, and he thereupon duly acknowledged to me that he executed the same.

GLADYS PRAVERMAN
NOTARY PUBLIC - State of New York
Qualified in Queens County
Cert. filed in N.Y. Co. Reg. # 41-0397950
Commission Expires March 30, 1955

Gladys Praverman
Notary Public

* Print or type name.
* If under 21 years of age, state "I am.....years of age".

[Deposition on Interrogatories of Abraham L. Kaminstein, taken at Library of Congress, Washington, D. C., May 14, 1956]

A B R A H A M L . K A M I N S T E I N was duly sworn by the Notary, who propounded the direct and cross interrogatories, and testified as follows:

DIRECT EXAMINATION:

Q1 What is your name and address? A1 My name is Abraham L. Kaminstein, and my business address is the Copyright Office, Library of Congress, Washington 25, D. C.

Q2 What is your present position? A2 Chief, Examining Division.

Q3 How long have you occupied such position?

A3 Since July 31, 1947.

Q4 How many years have you been employed in the United States Copyright Office? A4 Eight years, nine months.

Q5 Prior to occupying your present position, did you occupy any other position in the Copyright Office, and if so, describe the same? A5 I didn't occupy any other position in the Copyright Office.

Q6 What are your duties in the Copyright Office?

A6 The Chief of the Examining Division plans and directs the work of examining the more than 225,000 applications for registration of claims to copyright now received yearly, in order to determine whether certain requirements of Title 17 United States Code have been met. He rules on doubtful applications and reviews rejected claims.

The Register of Copyrights has delegated his authority in this area, in the first instance, to the Examining Division, and the Chief considers appeals and finally rules on all cases except those in which there is an unresolvable difference of opinion between him and the applicant.

The Chief formulates and carries out changes in Copyright Office policies and practices governing the registry system.

Q7 When were the Regulations of the Copyright Office amended so as to permit registration of claims to copyright on artistic jewelry? A7 The Regulations of the Copyright Office were amended on July 2, 1948 to include the term "artistic jewelry" as one of the examples of works of art which could be registered. It should also be noted that claims to copyright in pieces of jewelry, which were also clearly "works of art" under the statute, had been registered in the Copyright Office prior to that time.

Q8 Approximately when did the Copyright Office receive its first applications for registration of artistic jewelry after amendment of the Regulations? A8 Applications for registration of claims to copyright in jewelry were registered prior to July 2, 1948, when Section 201.4(b)(7) of the Regulations was amended and there were quite a few registrations made within a few months after the Section was amended.

Q9 On and prior to September 21, 1954, what were the procedures adopted by the Copyright Office under Option "B" in the registration of claims to copyright in published three-dimensional

works of art in the form of ladies costume jewelry in respect to publication, deposit of photographs, deposit of copies and filing of applications for registration? A9 Under Section 201.7(c) of the Regulations, approved May 27, 1948, an applicant may choose to file works of art under "Option B" by sending two copies of the best edition of the work and marking the package so that the Copyright Office knows that this option has been chosen. The Copyright Office supplies labels for this purpose. Upon receipt of the copies, the Copyright Office makes its examination and returns the copies to the applicant.

The section calls for the submission in these cases of an application on Form GG, a photograph or photographs which identify the work, and the statutory fee of $4.00. The photographs are retained by the Copyright Office. I do not understand what is meant by procedures with respect to publication, but Form GG is designed for use in cases of published works of art.

Q10 Between September 21, 1954, and March 9, 1955, were there any changes made in the procedures mentioned in the previous question, and if so, what were they? A10 I do not recall any changes in this period.

Q11 Approximately when did Marcel Boucher d/b/a Boucher, or anyone on his behalf, make his first applications to register claims to copyright on jewelry? A11 Sixty-nine applications were submitted on September 21, 1954.

Q12 What was the position of the Copyright Office on and prior

200a

Defendants' Exh. No. J

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213	PIN	1	DZ	13.50	13.50	
209	PIN	1	DZ	13.50	13.50	
210	EAR	1	DZ	13.50	13.50	
208	EAR	1	DZ	13.50	13.50	
206	EAR	1	DZ	13.50	13.50	
220	EAR	1/3	DZ	13.50	4.50	
524	PIN	1/2	DZ	18.00	9.00	
505	PIN	1/2	DZ	18.00	9.00	
506	EAR	1	DZ	13.50	13.50	
501	NECK	1/2	DZ	24.00	12.00	
502	BRAC	1/3	DZ	24.00	8.00	
509	NECK	1/3	DZ	36.00	12.00	
511	BRAC	1/3	DZ	30.00	10.00	
519	PIN	1	DZ	13.50	13.50	
514	EAR	1	DZ	13.50	13.50	
6101	NECK	1/6	DZ	75.00	12.50	
6103	BRAC	1/12	DZ	60.00	5.00	
6105	PIN	2/3	DZ	30.00	20.00	
6104	PIN	1	DZ	24.00	24.00	
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221	PIN		1/6 DZ	13.50	2.25	
213	PIN		1/2 DZ	13.50	6.75	
210	EAR		1/2 DZ	13.50	6.75	
220	EAR		1/6 DZ	13.50	2.25	
214	EAR		1/2 DZ	13.50	6.75	
206	EAR		1/2 DZ	13.50	6.75	
218	EAR		1/3 DZ	13.50	4.50	
219	EAR		1/3 DZ	13.50	4.50	
208	EAR		1/2 DZ	13.50	6.75	
504	PINS		1/2 DZ	13.50	6.75	
527	EAR		1/2 DZ	13.50	6.75	
507	NECK		1/2 DZ	13.50	6.75	
508	BRAC		1/2 DZ	13.50	6.75	
503	EAR		1/2 DZ	13.50	6.75	
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at 304-310 East 23rd Street, in the Borough of Manhattan, City, County and State of New York.

My full name is* Marcel Boucher

and I reside at 4143 Richmond Avenue, Eltingville, Staten Island, New York.

I Further Certify [illegible]

[illegible]

00833

1954 - A 95

Aug 10 '54

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to September 21, 1954, with respect to the separate registration by an author of jewelry incorporating the same basic design of another piece for which a Certificate of Registration had been issued to the author? A12 The Copyright Office will not knowingly register an application for a work which was the subject of another application for registration, where the second application covers the same basic design to which has been added some non-copyrightable element. Where two works embodying the same basic design are published on different dates, only the one published first will be registered. Where both are published on the same date, the applicant will be asked to choose.

Q13 Between September 21, 1954, and March 9, 1955, was there any change in the position of the Copyright Office as stated in the answer to question 12, and if there was any change, what was it? A13 There was no change that I can remember.

Q14 Do the records of the Copyright Office, between June 14, 1954, and March 9, 1955, show that certain copyright applications of Marcel Boucher were rejected because the jewelry pieces referred to in such applications incorporated the basic design of other pieces for which Certificates of Registration were concurrently issued to Marcel Boucher? A14 The records show that we stated that we could not register three applications submitted on behalf of Marcel Boucher because of duplication of design submitted on other applications.

Q15 If your answer to question 14 is in the affirmative, identify and describe the pieces that were rejected, and the grounds asserted

by the Copyright Office for such rejection? A15 There were three pairs of applications involved. In the first, the same basic design had been used in a bracelet -- Style 5784 -- and a necklace -- Style 5783. In the second, the design was used in an earring -- Style 5774 -- and a pin -- Style 5798. In the third, the applications covered two rings with similar designs -- Styles Numbers 403/6XX and 456/6XO.

As I remember it, the dates of publication being the same, I asked counsel for the claimant to choose which of each pair he preferred to have us consider, and he chose Styles Numbers 5783, 5798 and 456/6XO. We made registration for these three applications and filed the applications for the remaining three without action. I told Mr. Philip Dalsimer, counsel for Marcel Boucher, that we saw no basis for two registrations in these cases, there being no new copyrightable matter covered by the second application.

I find it difficult to describe the pieces except as indicated above, but the identifying photographs are filed in this office and are available here.

Q16 What is meant by the term "overlapping", as used by the Copyright Office in connection with the registration of claims to copyright in costume jewelry? A16 This term may be an attempt to describe the situation where two applications are submitted for similar designs. If the second application covered the same basic design to which has been added a non-copyrightable element, there is no basis for the second registration; but this does not mean

that the basic design will not be protected by the courts.

* * *

Q17 Between June 14, 1954 and March 9, 1955, did you have any conversations with Marcel Boucher, Marcel Boucher et Cie., or their representatives, in connection with the policy of the Copyright Office with respect to the registration of "overlapping" claims to copyright in costume jewelry? A17 Yes, if the reference to "overlapping" is taken to refer to the kind of case covered in question 15.

Q18 If the answer to the preceding question is in the affirmative, would you please state the dates of such conversations, with whom they were had and the substance thereof? A18 On June 29, 1954, Mr. Philip Dalsimer, counsel to Marcel Boucher, called me and asked if I would discuss with him the possibility of submitting applications for a new line of jewelry designed by Marcel Boucher. We arranged to examine this material during a week I was to spend in New York at the Practising Law Institute.

Sometime during that week, July 19 to July 23, 1954, I met with Messrs. Kane (of Kane and Dalsimer), Mr. McDermott, counsel to Marcel Boucher, and Mr. Stoneley, General Manager of Marcel Boucher, and went over this material. We discussed the kind of notice required, the use of trade names, the appropriate form of application, and the kind of photographs to be submitted. We discussed submission of combinations of brooch, earrings and necklaces of the same design, and I indicated that any combination could be

submitted on a single application if all the component parts were offered for sale as a unit.

On October 4, 1954, I met with Mr. Dalsimer to discuss some questions relating to the 69 applications filed by Marcel Boucher. It was at this meeting that we discussed the applications referred to in my answer to question 15, and the problem of duplication. I told Mr. Dalsimer that, in general, the Office would not register an application for a work which was the subject of another application, where the second application covered the same basic design to which had been added some non-copyrightable element, for example, a rhinestone or a pearl. I told him that we believed that ordinarily the addition or substitution of a pearl or rhinestone did not add any new copyrightable matter which would support a second application.

CROSS EXAMINATION

Q1 What were the Regulations of the Copyright Office prior to their amendment regarding registration of claims to copyright on artistic jewelry? A1 From 1917 to 1948, the Subsection on works of art read substantially as follows:

"Works of art and models or designs for works of art.--This term includes all works belonging fairly to the so-called fine arts. (Paintings, drawings, and sculpture.)

"The protection of productions of the industrial arts utilitarian in purpose and character even if artistically made or ornamented depends upon action under the patent law; but registration

in the Copyright Office has been made to protect artistic drawings notwithstanding they may afterwards be utilized for articles of manufacture.

"Toys, games, dolls, advertising novelties, instruments, or tools of any kind, glassware, embroideries, garments, laces, woven fabrics, or similar articles, are examples. The exclusive right to make and sell such articles should not be sought by copyright registration."

Q2 How long were the Regulations of the Copyright Office, prior to their amendment, regarding registration of claims to copyright on artistic jewelry, in effect? A2 There have been Regulations under the 1909 Act ever since 1910. The Regulations prior to 1948 did not mention jewelry, either by inclusion or exclusion.

Q3 When were the Regulations of the Copyright Office amended so as to permit registration of claims to copyright on artistic jewelry? A3 Jewelry is cited in Section 201.4(b)(7), of the Regulations approved July 2, 1948.

Q4 What caused the Copyright Office to amend the regulations to include artistic jewelry as copyrightable material? A4 The Section on works of art was amended in 1917 because it made no reference at that time to articles which might fairly be considered works of art, although they might also serve a useful purpose. There was a complete revision of this Section in 1948 and the old Section was superseded because it did not explicitly reflect the established practice of the Copyright Office; the prior Section defined only the

extremes of permissible and non-permissible registration. I might refer to the discussion on the change in the Regulation found in Mazer v. Stein, 347 U.S. 201 (1954).

Q5 On what basis did the Copyright Office first refuse to include artistic jewelry as copyrightable material and then later amending its regulation to include artistic jewelry as copyrightable material? A5 When the Section was superseded in 1948, jewelry was cited as a specific example of the type of material which would be considered for registration. The Copyright Office made many registrations for claims to copyright in jewelry which fell within the "work of art" category, prior to the change in the Regulation in 1948.

I am not aware that the Office, under the 1909 Act, ever excluded jewelry which clearly qualified as a "work of art."

Q6 Has the Register of Copyrights, subject to the approval of the Librarian of Congress, the power to amend the regulations so as to change them back to what they were prior to 1948 to exclude artistic jewelry as copyrightable material? A6 Under Section 207 of Title 17, U.S.C., the Register of Copyrights, subject to the approval of the Librarian of Congress, may amend the regulations though he obviously would not do so to exclude the registration of copyrightable material.

Q7 Does a new edition of a copyrightable work have to have a new copyright notice thereon? A7 The question is not clear as to what is meant by "new edition" or the kind of notice; it might refer to a great variety of situations. In general, however, the law

requires that a notice of copyright appear on every published copy of a work, with certain stated exceptions. This is true whether the "new edition" is a reprint or a "new version" containing new copyrightable matter.

Q8 Does a new edition as applicable to books also apply to artistic jewelry? A8 The import of this question is not clear. In general, the same consideration, with respect to copyright, would apply to books and jewelry. If a book is a reprint, without new matter, the Copyright Office would not register it; if it is a new version, containing substantial additions and revisions, registration could be considered if the requirements concerning publication and notice have been met. The same may be said for jewelry; Section 7 draws no distinctions as to the type of work involved.

Q9 Does the adding of rhinestones to a piece of artistic jewelry as opposed to its omission constitute a new edition? A9 This would depend entirely upon the particular work in question. If enough were added, and in such a way as to create what might be considered a "new work" within the meaning of Section 7, registration would be considered.

Usually, however, the addition or omission of rhinestones in the ordinary case -- in substitution for another jewel -- would not constitute copyrightable "new matter."

Q10 Does the adding of rhinestones to a piece of artistic jewelry as opposed to its omission constitute a revised edition?

A10 We would make no distinction between a new or revised

edition. Section 7 speaks both of "other versions" and of "works republished with new matter."

* * *

Q16 Would the Copyright Office refuse to issue a certificate of a claim to copyright on a work because it includes subject matter common to a work to which a certificate to a claim to copyright has already been issued? A16 No. Section 7 of Title 17 provides that "works republished with new matter, shall be regarded as new works subject to copyright . . ."

* * *

24562

No. 1017

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United States Court of Appeals

FOR THE SECOND CIRCUIT

No. 24,580

MARCEL BOUCHER d/b/a BOUCHER, and MARCEL BOUCHER and JEANNE BOUCHER d/b/a MARCEL BOUCHER ET CIE.,

Plaintiffs-Appellees,

against

DU BOYES, INC., ARKE, INC., CAPRI JEWELRY, INC., JULES STEINBERG, MORRIS KIMMELMAN, HYMAN SLOVITT, ABRAHAM J. SLOVITT and SAMUEL FRIEDMAN d/b/a B. STEINBERG-KASLO COMPANY (sued as JULES STEINBERG and I. SLOVITZ d/b/a B. STEINBERG-KASLO COMPANY), VOLUPTE, INC., and WALTER HEIMLER, INC.,

Defendants-Appellants.

BRIEF AND APPENDIX FOR PLAINTIFFS-APPELLEES

FORSYTHE, MCGOVERN & FETZER
Attorneys for Plaintiffs-Appellees,
405 Lexington Avenue
New York 17, N. Y.

THOMAS A. MCGOVERN,
BURTON L. KNAPP,
Of Counsel

TABLE OF CONTENTS

PAGE

AUTHORITIES:

Citations iii

Miscellaneous v

Statutes and Regulation Involved ..... vi, vii

STATEMENT 1

THE QUESTIONS PRESENTED 2

POINT I—The evidence of deliberate infringement by defendants is clear and convincing 3

POINT II—The District Court correctly held that artistic jewelry is a proper subject of copyright, and that plaintiffs' articles are "works of art" within the meaning of the Copyright Act 6

(a) The literal language of Section 5 of the Copyright Act and the legislative history leave no doubt that the term "works of art" is intended to cover plaintiffs' artistic jewelry 6

(b) Section 202.8 of the Copyright Office Regulations is consistent with Section 5(g) of the Act and the established practice of the Copyright Office since 1909 10

(c) The validity of copyrights on costume jewelry has been considered and sustained consistently by the District Judges in this Circuit 16

(d) The Boucher pieces in suit are original works of artistic craftsmanship created by the utilization of standard art techniques 17

By seeking to apply patent standards, defendants misconceive the essential principles of copyright 19

PAGE

The District Court properly held that Exhibit F was a different art representation and design from defendants' earrings (Exhibits 50 and 51), and that Exhibits 50 and 51 were copied from plaintiffs' earrings (Exhibits 6 and 7) protected by Copyright GP 7115 G 22

(e) The District Court's finding of fact that the Boucher jewelry pieces in suit are original works of art is fully supported by the evidence 24

POINT III—The addition of non-copyrightable matter to a copyrighted work does not require or permit separate copyright 25

POINT IV—Plaintiffs have complied with all of the notice requirements of the Copyright Act and Regulations 29

(a) Plaintiffs complied with the notice requirements of the Act with respect to the 4 copyrights covering 10 works published on June 14, 1954, as well as the 7 copyrights covering 15 works published on January 2, 1955 30

(b) A copyright notice on only one of two physically separate but interdependent articles, such as a pair of earrings, constitutes a sufficient notice under Section 10 of the Act, where earrings are designed, manufactured and sold and purchased with an intended use as pairs 33

POINT V—Copyright covers the component artistic parts of a work of art, and plaintiffs' copyrights entitle them to protection against defendants' copying of material and substantial artistic elements of plaintiffs' designs. The District Court properly held that defendants' necklaces (Exhibits 52 and 53) infringed plaintiffs' Copyright GP 7109 G 39

PAGE

POINT VI—The District Court's award of defendants' profits and an attorney's fee was well within the limits of the Court's discretion under Sections 101(b) and 116 of the Copyright Act 43

CONCLUSION 45

CITATIONS

Cases

Harry Alter Co. v. A. E. Borden Co., D.C. Mass. 1954, 121 F. Supp. 941 41

Andrews v. Guenther Pub. Co., S.D.N.Y. 1932, 60 F. 2d 555 26

Baron v. Leo Feist, Inc., S.D.N.Y. 1948, 78 F. Supp. 686, affd. 2 Cir. 1949, 173 F. 2d 288 29

Alfred Bell & Co. v. Catalda Fine Arts, 2 Cir. 1951, 191 F. 2d 99 ..... 19, 23

Bleistein v. Donaldson Lithographing Co., 188 U. S. 239 (1903) 9, 14, 24

Burrow-Giles Lithographic Co. v. Sarony, 111 U. S. 53 (1884) 9, 19, 21, 29

Deward & Rich v. Bristol Savings & Loan Corp., 4 Cir. 1941, 120 F. 2d 537 37

Fielding v. Hawley, 1883, 48 L.T. 639, 47 J.P. 582 .. 36

Fred Fisher, Inc. v. Dillingham, S.D.N.Y. 1924, 298 Fed. 145 22

Fleischer Studios v. Ralph A. Freundlich, Inc., 2 Cir. 1934, 73 F. 2d 276 ..... 29, 32

Hoague-Sprague Corp. v. Frank C. Meyer Co., E.D.N.Y. 1929, 31 F. 2d 583 35

Hollywood Jewelry Mfg. Co., Inc. v. Dushkin, S.D. N.Y. 1955, 136 F. Supp. 738 .....17, 29, 32

Jungersen v. Baden, S.D.N.Y. 1947, 69 F. Supp. 922, affd. 2 Cir. 1948, 166 F. 2d 807, affd. 335 U. S. 560. 21

King Features Syndicate v. Fleischer, 2 Cir. 1924, 299 Fed. 533 .....19, 21, 26, 42

PAGE

Lydiard-Peterson Co. v. Woodman, 8 Cir. 1913, 204 Fed. 921 35

Markham v. A. E. Borden Co., 1 Cir. 1953, 206 F. 2d 199 41
Mazer v. Stein, 347 U. S. 201 (1954) 12, 14, 16, 25, 28
Metro Associated Services v. Webster City Graphic, Inc., D.C. Iowa 1953, 117 F. Supp. 224 37

Patterson v. Century Productions, 2 Cir. 1937, 93 F. 2d 489, cert. den. 303 U. S. 655 34

Remick Music Corp. v. Interstate Hotel Co., D.C. Nebr. 1944, 58 F. Supp. 523, affd. 8 Cir. 1946, 157 F. 2d 744; cert. den. 329 U. S. 809 28
Rushton v. Vitale, 2 Cir. 1955, 218 F. 2d 434 20

Shapiro, Bernstein & Co. v. Goody, 2 Cir. 1957, 248 F. 2d 260 45
Shapiro, Bernstein & Co. v. Jerry Vogel Music Co., 2 Cir. 1947, 161 F. 2d 406; cert. den. 331 U. S. 820 ..... 26, 29, 32
Sheldon v. Metro-Goldwyn Pictures Corp., 2 Cir. 1939, 106 F. 2d 45, affd. 309 U. S. 390 45
Stein v. Expert Lamp Co., 7 Cir. 1951, 188 F. 2d 611 13
Stein v. Mazer, 4 Cir. 1953, 204 F. 2d 472 ..... 12, 15

Trifari, Krussman & Fishel, Inc. v. Charel Co., S.D.N.Y. 1955, 134 F. Supp. 551 16
Trifari, Krussman & Fishel, Inc. v. B. Steinberg-Kaslo Co., S.D.N.Y. 1956, 144 F. Supp. 577 17

Werckmeister v. Springer Lithographing Co., C.C. S.D.N.Y. 1894, 63 Fed. 808 ..... 29, 33
Westermann Co. v. Dispatch Printing Co., 249 U. S. 101 (1919) 45
F. W. Woolworth Co. v. Contemporary Arts, 1 Cir. 1951, 193 F. 2d 162, affd. 344 U. S. 228 .....19, 25, 27, 44

Ziegelheim v. Flohr, E.D.N.Y. 1954, 119 F. Supp. 324 ..... 29, 32

Statutes

PAGE

Copyright Laws:

Act of July 8, 1870, 16 Stat. 212, Sec. 86 ..... 7, 8

Act of 1909, 35 Stat. 1076 ..... 7, 8

Act of July 30, 1947, 61 Stat. 652, codifying and enacting into positive law Title 17 of the United States Code, 17 U.S.C., Supp. V, 1, et seq.

17 U.S.C. 3 39

17 U.S.C. 4 9

17 U.S.C. 5 ..... 8, 9, 10

17 U.S.C. 10 ..... 33, 43

17 U.S.C. 19 30

17 U.S.C. 101(b) 43, 44

17 U.S.C. 116 ..... 43, 45

Miscellaneous

Regulations of the Copyright Office:

Sec. 201.4(b)(7) (37 C.F.R. 1939 ed. 201.4(b)(7)) .. 10

Sec. 202.8 (37 C.F.R. 1949 ed. 202.8) 10, 12, 15

Hearings Committee on Patents, House of Representatives and Senate Committee on Patents, H.R. 19853, 59th Cong., 1st Sess., June 6-9, 1906, p. 11) 9

Webster, New International Dictionary (2d ed.) ... 8

Rogers and Beard, 5000 Years of Gems and Jewelry, Frederick A. Stokes Co. (1940) p. 96 21

Statutes Involved

17 United States Code 3, 4, 5, 10, 19

§ 3. *Protection of component parts of work copyrighted; composite works or periodicals*

The copyright provided by this title shall protect all the copyrightable component parts of the work copyrighted, and all matter therein in which copyright is already subsisting, but without extending the duration or scope of such copyright. The copyright upon composite works or periodicals shall give to the proprietor thereof all the rights in respect thereto which he would have if each part were individually copyrighted under this title. * * *

§ 4. *All writings of author included*

The works for which copyright may be secured under this title shall include all the writings of an author. * * *

§ 5. *Classification of works for registration*

The application for registration shall specify to which of the following classes the work in which copyright is claimed belongs:

(a) Books, including composite and cyclopedic works, directories, gazetteers, and other compilations.

(b) Periodicals, including newspapers.

(c) Lectures, sermons, addresses (prepared for oral delivery).

(d) Dramatic or dramatico-musical compositions.

(e) Musical compositions.

(f) Maps.

(g) Works of art; models or designs for works of art.

(h) Reproductions of a work of art.

(i) Drawings or plastic works of a scientific or technical character.

(j) Photographs.

(k) Prints and pictorial illustrations including prints or labels used for articles of merchandise.

(l) Motion-picture photoplays.

(m) Motion pictures other than photoplays.

The above specifications shall not be held to limit the subject matter of copyright as defined in section 4 of this title, nor shall any error in classification invalidate or impair the copyright protection secured under this title. * * *

§ 10. *Publication of work with notice*

Any person entitled thereto by this title may secure copyright for his work by publication thereof with the notice of copyright required by this title; and such notice shall be affixed to each copy thereof published or offered for sale in the United States by authority of the copyright proprietor, except in the case of books seeking ad interim protection under section 22 of this title. * * *

§ 19. *Notice; form*

The notice of copyright required by section 10 of this title shall consist either of the word "Copyright", the abbreviation "Copr.", or the symbol ©, accompanied by the name of the copyright proprietor, and if the work be a printed literary, musical, or dramatic work, the notice shall include also the year in which the copyright was secured by publication. In the case, however, of copies of works specified in subsections (f) to (k), inclusive, of section 5 of this title, the notice may consist of the letter C enclosed within a circle, thus ©, accompanied by the initials, monogram, mark, or symbol of the copyright proprietor: *Provided,*

That on some accessible portion of such copies or of the margin, back, permanent base, or pedestal, or of the substance on which such copies shall be mounted, his name shall appear. * * * As amended Aug. 31, 1954, c. 1161, § 3, 68 Stat. 1032.

REGULATION INVOLVED

37 CFR, 1949, § 202.8

Works of art (Class G)—(a)—In General. This class includes works of artistic craftsmanship, in so far as their form but not their mechanical or utilitarian aspects are concerned, such as artistic jewelry, enamels, glassware, and tapestries, as well as all works belonging to the fine arts, such as paintings, drawings and sculpture * * *.

INDEX TO APPENDIX

Transcript of Testimony:

	Direct	*Cross*	
Witnesses at Trial			
For Plaintiffs			
Marcel Boucher	2a	8a	
Jules Steinberg	9a		
Colloquy			14a
Witness before Special Master			
For Defendants			
Hyman Slovitt	23a		
Report of Special Master ...			24a

BRIEF FOR PLAINTIFFS-APPELLEES

Statement

In 1954 and 1955 plaintiff, Marcel Boucher, an internationally known designer of artistic jewelry, created and introduced to the public a number of copyrighted costume jewelry pieces. The Boucher works enjoyed immediate commercial success. Defendant B. Steinberg-Kaslo Company is a manufacturer, and the five corporate defendants are jobbers, of costume jewelry. After gauging the public acceptance of the original Boucher works, the manufacturer purchased the 25 most popular Boucher works in retail stores, used them as models to make copies, and sold the copies to the corporate defendants and other jobbers throughout the country. In 1955 over 300,000 copies of the 25 original Boucher works were placed on the market by defendants.

After a trial before Judge Ryan on November 26, 27 and 28 and December 12, 1956, the Court found that all six defendants had deliberately infringed 11 valid copyrights covering the 25 original Boucher works in suit. An interlocutory judgment was entered on January 7, 1957, concurrently with written findings of fact and conclusions of law (D. 152a-166a). A permanent injunction was granted, and the District Court appointed a special master to hear proofs with respect to damages and profits. Defendants filed a notice of appeal dated January 30, 1957 from the interlocutory judgment (D. 167a).

Hearings on the issues of damages and profits were held before the special master on ten separate dates between January 30, 1957 and May 28, 1957, and over 1,100 pages of testimony were taken (R. 650-1809). By order dated September 10, 1957 (R. 1840) the District Court confirmed the report of the special master in all respects and fixed a reasonable fee for the services of plaintiffs' attorneys in this action in the sum of $10,000. Final judgment was

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References to Defendants-Appellants' appendix are indicated by D, to Plaintiffs-Appellees' appendix by P, and to the record on appeal by R.

entered against all of the defendants on October 1, 1957 in the aggregate sum of $31,776.89, including the attorneys' fee (D. 168a-171a).

Although defendants also filed a notice of appeal on October 10, 1957 (D. 172a) from the final judgment, and docketed the supplemental record on appeal on November 6, 1957, defendants do not specifically challenge in their Brief the special master's computation of defendants' profits or plaintiffs' damages as adopted by the Court, nor the reasonableness of the attorneys' fee fixed by the Court. The issues raised by defendants on this appeal therefore narrow down to claimed errors of fact and law by the trial judge in upholding the validity of the copyrights in suit.

The Questions Presented

The District Court's findings of fact specifically set forth the 11 copyrights involved, plaintiffs' 25 pieces covered by those copyrights, and the corresponding infringing pieces marketed by defendants (D. 160a).

In view of the clear evidence of deliberate infringement by defendants, the trial was confined principally to issues raised by no less than 14 separate defenses interposed in defendants' answer (D. 83a-150a). Highly technical questions were raised in respect of an alleged failure of plaintiffs to comply with the statutory requirements of copyright. The trial judge properly decided these questions adversely to defendants.

The precise questions of law and fact involved on this appeal as formulated on pages 1-3 of defendants's brief received the most careful and thorough consideration of the District Judge. Three days were devoted to the testimony and receipt of the many exhibits in evidence (R. 1-292). All evidence had been received by November 28, 1956, and the parties were afforded a period of two weeks to submit briefs relating to the same questions now raised on this appeal. Extensive briefs were submitted on behalf of both sides and oral argument was had on December 12, at which time Judge Ryan made the rulings (P. 14a-22a)

which were embodied in the findings of fact and conclusions of law (D. 152a-163a).

The questions raised at the trial and on this appeal may fairly be broken down into (1) the over-all question, affecting all of the articles of jewelry involved in the suit, as to whether artistic jewelry is copyrightable subject matter; and (2) specific questions relating to the claimed invalidity of the copyrights on some of plaintiffs' works, by reason of an alleged failure to comply with the technical requirements of copyright.

It is respectfully submitted that neither the "facts" stated by defendants in their brief, nor the legal authorities, lend support to the defenses asserted. To the contrary, the record points to the inescapable conclusion that defendants have contrived their multiplicity of technical defenses in an attempt to distract attention from their wilful disregard of plaintiffs' rights.

ARGUMENT

POINT I

The evidence of deliberate infringement by defendants is clear and convincing.

Defendants assert that the District Court erred in making its finding of fact No. 12 (D. 160a) as follows:

> "All of the individual defendants deliberately copied plaintiffs' copyrighted articles of costume jewelry. The said individual defendants used the plaintiffs' articles as models from which rubber molds were made. Identical reproductions of plaintiffs' articles were then produced in the rubber molds."

It is respectfully submitted that the defendants' denial at this juncture of their acts of deliberate infringement is frivolous. The record contains proof, not by a preponderance of the evidence, but rather, beyond a reasonable doubt, that in conscious disregard of actual notice of copyright, defendants wilfully and deliberately pirated all 25 Boucher pieces in suit.

Plaintiffs do not wish to indulge in supererogation on the issue of deliberate infringement, but in view of the assertion made for the first time on this appeal (D. Br. p. 41) that the manufacturing defendants "felt free" to use certain of the Boucher pieces as models, comment is in order. Defendants now assert that in canvassing retail stores in search of Boucher originals from which to make their infringing copies, Steinberg-Kaslo's partners purchased only the "rhinestone" pieces, which they then used to make all of their copies. Although there is not a whit of evidence in the record that defendants made inquiry, the sly suggestion is advanced that they were misled as to the existence of the copyrights by the fact that the Boucher pieces with rhinestone trim were not separately registered.

The record as a whole and, in particular, the testimony in defendants' Appendix (D. 45a-46a) instantly refutes this belated protestation of innocence.

The manufacturing defendants' partner and production manager, Jules Steinberg, admitted that original Boucher pieces were purchased in retail stores and used as models for making all of the infringing pieces (R. 161, 171, 172, 173, 175, 176, 179, 183; P. 9a-12a). The witness denied any recollection as to which of his partners purchased the pieces (R. 177, 183), when they were purchased (R. 179), or the retail stores where the purchases were made (R. 160, 179, 183). Nevertheless, defendants now purport to claim as conclusive evidence this witness' testimony that Steinberg-Kaslo purchased and used only the Boucher "rhinestone" pieces. It is submitted that the record shows this witness' testimony to have been prompted solely by a desire to conform the facts to the legal theory of one of the patently insufficient defenses (D. 115a).

Exhibit 45 is defendants' copy of Exhibit 20, a Boucher pin containing two pearl inserts, and upon which Copyright Certificate GP 7855 G was issued on March 9, 1955 (Ex. 22; D. 82a6). Exhibit 44 is defendants' copy of Exhibit 21, a Boucher pin identical to Exhibit 20, except for the use of two rhinestone inserts instead of two pearl inserts. In

the pre-trial deposition of the witness, Steinberg, he testified that his firm used the Boucher piece "with the pearls" (Ex. 20; R. 168, 193) to make the Steinberg-Kaslo imitations (Exs. 44, 45). Later in his deposition he stated he used the piece with the "rhinestones" (Ex. 44; R. 194). At the trial he reverted to his original testimony and stated that he used the Boucher piece with the pearls (R. 168; P. 11a). He subsequently changed his testimony for the fourth time and asserted that he used the Boucher "rhinestone" piece (R. 194, D. 50a).

At a later juncture in the trial, Mr. Steinberg was "definite" that Steinberg-Kaslo used a Boucher piece with "rhinestones" to make defendants' infringing copies of Exhibit 23 (R. 184, D. 44a). When confronted with the fact that the Boucher firm did not produce any other piece embodying the design of Exhibit 23, he again changed his testimony and stated that he was "not sure" as to whether Steinberg-Kaslo used a "plain" Boucher piece or a piece with "rhinestones" to copy Exhibit 23, nor, for that matter, was he sure whether his firm used the Boucher plain or rhinestone pieces to copy the other pieces in suit (D. 46a). It is highly significant that none of Steinberg-Kaslo's partners denied the fact that every single one of the original Boucher pieces purchased by them in retail stores bore the legible copyright notice "© Boucher" (P. 12a).

Although the Court properly held that it was immaterial to the issue of infringement whether defendants used the Boucher registered pieces or the embodiments thereof with rhinestone trim, since all pieces were fully protected by the 11 copyrights and bore proper copyright notices, the testimony readily refutes defendants' contention that their infringements may have been innocent, or that they were misled or "felt free" to copy the embodiments of the copyrighted pieces with rhinestone trim.

The clear and convincing proof in the record is that, in their haste to profit from the fruits of plaintiffs' efforts, defendants really did not care whether the Boucher pieces they purchased in retail stores were copyrighted or not.

Any question as to the defendants' intention to deliberately pirate the Boucher designs is quickly resolved by the evidence showing that defendants continued to market their copies for a period of six months after suit had been instituted (D. 161a, P. 13a; R. 649).

POINT II

The District Court correctly held that artistic jewelry is a proper subject of copyright, and that plaintiffs' articles are "works of art" within the meaning of the Copyright Act.

(a) The literal language of Section 5 of the Copyright Act and the legislative history leave no doubt that the term "works of art" is intended to cover plaintiffs' artistic jewelry.

By a laborious process of excogitation, defendants seek to build an impression that the 1948 Regulation wrought a "radical change" (D. Br., p. 16) in the pre-existing Regulation. They then proceed to shoot down their man-of-straw with the argument that only an Act of Congress could authorize such "change." The District Court properly rejected this argument, as well as defendants' other unsupported assertion that in accepting plaintiffs' jewelry for registration, the Copyright Office deviated from its "established practice" (D. Br., p. 18).

A literal reading of Section 5(g) of the Act and the legislative history, as well as the interpretation thereof reflected in the regulations and practice of the Copyright Office since 1909, readily shows that defendants' construction of the Act does violence to clear and unambiguous language. The fact that the Act does not specifically list particular works is of no consequence; it includes all "works of art." The statutory term "work of art" can by no stretch of the imagination be interpreted to exclude jewelry, or, for that matter, any one of a myriad of other works in fields of endeavor not even approaching jewelry-design as one of mankind's great traditional arts. Section

202.8 of the Regulations merely implements the declared policy of Congress.

In purporting to describe the genesis of the present Copyright Act, on page 21 of their Brief, defendants have misstated the language of the Act of 1870 and have not fairly described the broad extension of copyright protection brought about by the Act of 1909.

The Act of 1870 (16 Stat. 212), which brought three-dimensional works of art within the scope of copyright protection for the first time, defined copyrightable subject matter as:

> " * * * any book, map, chart, dramatic or musical composition, engraving, cut, print or photograph or negative thereof, or of a painting, drawing, chromo, statue, statuary, and of models or designs intended to be perfected as works of the *fine arts.*" (Emphasis supplied)

The distinction, if any, which had theretofore existed between works of the so-called "pure" or "fine" arts, and works of art which serve utilitarian purposes, was eliminated by Congress in the 1909 Act. The 1909 Act provided:

> "The application for registration shall specify to which of the following classes the work in which copyright is claimed belongs:
>
> * * * *
>
> "(g) *Works of art;* models or designs for *works of art;*
>
> * * * *
>
> "Provided, nevertheless, that the above specifications shall not be held to limit the subject-matter of copyright as defined in section four of this Act, nor shall any error in classification invalidate or impair the copyright protection secured under this Act" (35 Stat. 1076). (Emphasis supplied)

Defendants take cognizance of the elimination of the word "fine" in the 1909 and 1947 Acts, but assert that Congress did not thereby extend copyright coverage to "articles of craftsmanship" (D. Br. p. 22). Since Michelangelo's famous statue of David and Cellini's great golden saltcellar are undeniably "articles of craftsmanship," de-

fendants' argument, taken literally, would make the 1909 Act even more limited than the 1870 Act, which clearly brought three-dimensional works within the scope of copyright. If, by their argument, defendants claim that artistic jewelry combines aesthetic and utilitarian features and that the Act bars such combinations from copyright, defendants are obliquely claiming that Congress did not mean what it said when it eliminated the word "fine" in 1909.

The last clause of Section 5 of the 1909 Act, as carried over without change into the 1947 Act,[1] on its face refutes the contention that Congress' failure to specifically mention jewelry, or other subject matter pertaining to the arts, acts as a limitation on copyright. Rather, the deliberate omission of the word "fine" by Congress in the 1909 Act expressed its clear intention, reaffirmed in the 1947 Act, to substantially extend the protection of the copyright laws by using the term "works of art" in its commonly understood, ordinary and accepted sense.[2]

By adopting the broad phrase, "works of art", in 1909, Congress not only eliminated any distinction which might have theretofore existed between the aesthetic and the useful; it also, by refusing to specify rigid categories of "art," further expressed a clear intention to protect by copyright original works in an infinite variety of artistic, three-dimensional forms. At the Congressional Hearings prior to the enactment of the 1909 Act, Mr. Herbert Putnam, then Librarian of Congress, testified as follows:

---

[1] The Act of July 30, 1947 (61 Stat. 652) codified and enacted into positive law Title 17 of the United States Code without change in the pertinent provisions.

[2] "Art" is the "application of skill and taste to production according to aesthetic principles * * * application to the production of beauty in plastic materials by imitation or design, as in painting and sculpture * * * that which is produced, as paintings, sculpture, etc., by the application of skill and taste." *Webster, New International Dictionary* (2nd Ed.) p. 155. "Fine art" is "art which is concerned with the creation of objects of imagination and taste for their own sake and without relation to the utility of the object produced." Id. at 949.

"* * * The term 'works of art' is deliberately intended as a broader specification than 'works of the fine arts' in the present statute with the idea that there is subject matter (for instance, of applied design, not yet within the province of design patents), which may properly be entitled to protection under the copyright law." (Hearings Committee on Patents, House of Representatives and Senate Committee on Patents, H.R. 19853, 59th Cong., 1st Sess., June 6-9, 1906, p. 11.)

Defendants' reliance on the parenthetical portion of Mr. Putnam's remarks is misplaced. It is obvious that by the qualification, "for instance", he merely gave an example of copyrightable subject matter—not a limitation. Defendants' *ad hoc* conclusion that protection of jewelry was intended to be covered by design patents cannot be supported by Mr. Putnam's remarks, nor any other legislative, administrative or judicial authority.

Further evidence of Congress' intention to bring artistic jewelry, as well as other subject matter not specifically mentioned, within the scope of copyright is to be found in a reading of the Act as a whole. Section 4 (17 U. S. C. 4) declares that the subject-matter of copyright "shall include all the writings of an author."[3] In Section 5 Congress has expressly declared that the specifications "shall not be held to limit the subject matter of copyright." If, by their contention that the Act bars from copyright "articles of craftsmanship," defendants mean that articles having some utility cannot be protected from piracy, Section 5 of the Act discloses no prejudice against utility. The various subsections include, but are not limited to,

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[3] Article 1, Sec. 8, Clause 8 of the Constitution provides that Congress shall have power "To promote the Progress of Science and the useful Arts by securing for limited times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries." Plaintiffs agree with defendants' statement that "writings" does not mean literal "writings," and that Congress determines the scope of those literary and artistic works which constitute "writings" (D. Br. pp. 20, 21). See also *Burrow-Giles Lithographic Co.* v. *Sarony*, 111 U. S. 53 (1884); *Bleistein* v. *Donaldson Lithographing Co.*, 188 U. S. 239 (1903).

"newspapers," "maps," "drawings of plastic works of a scientific or technical nature," "photographs," and "prints or labels used for articles of merchandise." Defendants cannot seriously contend that within the context of Section 5 as a whole, Congress has declared an incompatibility between beauty and utility. Although used as personal adornment by women, jewelry pieces are to be numbered among the art treasures of the greatest museums of the world. It tortures plain language to suggest that Congress has barred from copyright works belonging to a great decorative art which has existed at least since the early days of the Egyptian civilization.

(b) Section 202.8 of the Copyright Office Regulations is consistent with Section 5(g) of the Act and the established practice of the Copyright Office since 1909.

In the light of the unmistakably clear language of Section 5 of the Act and the legislative history, there can be no doubt that Section 202.8 of the Copyright Office Regulations defining "works of art," comes squarely within the mandate of Congress. There is no merit to defendants' contention that by the 1948 amendment the Register of Copyrights improperly enlarged copyright of the class of "works of art" eligible for registration, or otherwise usurped the power of Congress. Defendants' reliance on language of the pre-1948 Regulations (§201.4(b)(7)) (37 C.F.R. 1939 ed. 201.4(b)(7)) is completely misplaced, inasmuch as the sole effect of the 1948 Regulations was to clarify the standard of copyrightability established by the Act and practices of the Copyright Office over a period of many years. Moreover, the record herein completely controverts defendants' erroneous assertion of fact that, by accepting artistic jewelry for registration, the Copyright Office somehow deviated from its "established practice" (D. Br., p. 18).

The deposition on interrogatories, dated May 14, 1956, of Abraham L. Kaminstein, Chief, Examining Division of the Copyright Office (Ex. 71; D. 210a-220a) succinctly explains the actual practices of the Copyright Office under

the pre-1948 regulations. In answering cross-interrogatories propounded by counsel for defendants, Mr. Kaminstein testified:

> "Q4 What caused the Copyright Office to amend the regulations to include artistic jewelry as copyrightable material?
>
> "A4 The Section on works of art was amended in 1917 because it made no reference at that time to articles which might fairly be considered works of art, although they might also serve a useful purpose. There was a complete revision of this Section in 1948 and the old Section was superseded because it did not explicitly reflect the established practice of the Copyright Office; the prior Section defined only the extremes of permissible and non-permissible registration. * * *
>
> "Q5 On what basis did the Copyright Office first refuse to include artistic jewelry as copyrightable material and then later amending its regulation to include artistic jewelry as copyrightable material?
>
> "A5 When the Section was superseded in 1948, jewelry was cited as a specific example of the type of material which would be considered for registration. The Copyright Office made many registrations for claims to copyright in jewelry which fell within the 'work of art' category, prior to the change in the Regulations in 1948.
>
> "I am not aware that the Office, under the 1909 Act, ever excluded jewelry which clearly qualified as a 'work of art.'"

The anxiety expressed by defendants (D. Br., p. 19) that the Copyright Office might suddenly amend the Regulations and eliminate jewelry as a work of art, appears to be somewhat less than real, since in the portion of the interrogatories quoted by defendants themselves (D. Br., p. 19) Mr. Kaminstein stated that "obviously" the Register of Copyrights would not amend the regulations "so as to exclude the registration of copyrightable material" (D. 218a).

It may be readily seen that the defendants' self-created conclusion that the Copyright Office "specifically excluded"

artistic jewelry from copyright prior to 1948 (D. Br., p. 27), or that artistic jewelry was "suddenly" made copyrightable (D. Br., p. 19), is refuted by record testimony in this case, as well as by the statutory language and legislative history of the copyright laws. As will also be seen herein, defendants' "facts" are further controverted by important judicial decisions involving the precise issues now raised by them on this appeal.

In the recent decision of *Mazer* v. *Stein*, 347 U. S. 201 (1954), the Supreme Court of the United States squarely sustained 202.8 of the Regulations and held that the standard of copyrightability therein stated conforms in every respect with the intention of Congress as expressed in the Copyright Act. The case was one of a series of infringement suits instituted in several jurisdictions, involving the validity of copyrights on statuettes intended primarily to be used in the form of lamp bases. As stated in the Supreme Court's opinion, publication of the works took place with the statuettes fitted as complete lamp assemblies, with electric wiring, sockets and lamp shades attached. All but an insignificant number of the statuettes were sold to the public as fully equipped lamps. Copyright registrations on the bases were issued pursuant to §202.8 of the 1948 Regulations, the same Regulation which specifically enumerates artistic jewelry as a "work of art" eligible for copyright.

The 4th Circuit (*Stein* v. *Mazer*, 204 F. 2d 472), from which the Supreme Court appeal was taken, sustained the validity of the copyrights. Judge Dobie compared the language of §202.8 of the Regulations with that of the previous corresponding Regulation and concluded (at p. 477):

> "Concededly, a copyright does not purport to give to the copyrightee any rights to the mechanical or utilitarian uses of a work of art. A copyright does, however, protect the work of art *qua* work of art without regard to any functional use to which it might be put. * * * The critical inquiry, therefore, is not whether the particular work sought to be registered has utility but whether it is a work of art irrespective of its utility.

> "Since 1909, it seems to have been the practice of the Copyright Office to grant copyrights to works of art, and to deny copyrights to purely utilitarian objects. An object of artistic conception in a standard art form—e.g., sculpture or painting—has not been denied registration merely because of its possible utilitarian aspects. It is the work of art that is thus protected, not its utilitarian aspects. Thus copyright registration has been granted for stained glass windows, bas-relief bronze doors, sculptures in book-ends, candlestick holders and statuary lamps.
>
> "On the other hand, it has been the practice of the Copyright Office since 1909 to refuse copyright registration *only* to those works of a wholly utilitarian nature, which could not be called works of art although they might possess pleasing design. Rejection has been placed on the ground that protection for such works lay only under the Design Patent Law. Thus, registration has been refused for designs for refrigerators, clocks, stoves, gasoline pumps and oil dispensers."

Inasmuch as the 7th Circuit (*Stein* v. *Expert Lamp Co.*, 188 F. 2d 611) had come to an opposite conclusion by holding that protection of the statuettes should have been sought by design patents,[4] the Supreme Court granted certiorari. In sustaining the validity of the copyrights and resolving the question of statutory interpretation raised by the conflicting holdings of the various Circuits, the Supreme Court, speaking through Mr. Justice Reed, stated:

> "The successive acts, the legislative history of the 1909 Act and the practice of the Copyright Office unite to show that 'works of art' and 'reproductions of works of art' are terms that were intended by Congress to include the authority to copyright these statuettes. Individual perception of the beautiful is too varied a power to permit a narrow or rigid concept of art. As a standard we can hardly do better than the words of the present Regulation, §202.8, *supra,* naming the things that appertain to

[4] Defendants' argument in Point 1 of their Brief closely parallels the rationale of the 7th Circuit opinion, which was expressly rejected by the Supreme Court in the *Mazer* case, *supra.*

> the arts. They must be original, that is, the author's tangible expression of his ideas. * * * Such expression, whether meticulously delineating the model or mental image or conveying the meaning by modernistic form or color, is copyrightable. * * * *" (page 214)
>
> * * * *
>
> "* * * We do hold that the patentability of the statuettes, fitted as lamps or unfitted, does not bar copyright as works of art. Neither the Copyright Statute nor any other says that because a thing is patentable it may not be copyrighted. We should not so hold." (page 217)
>
> * * * *
>
> "* * * We find nothing in the copyright statute to support the argument that the intended use or use in industry of an article eligible for copyright bars or invalidates its registration. We do not read such a limitation into the copyright law." (page 218)

Inasmuch as the defendant in the *Mazer* case, *supra*, also raised an issue as to whether the 1948 Regulations represented a departure from Copyright Office practice under the prior Regulations, the Court invited the Register of Copyrights to file a brief *amicus curiae* setting forth the relevant practices of the Copyright Office. As stated in the Supreme Court's opinion (p. 212), the *amicus* brief "gives 60 examples selected at five-year intervals, 1912-1952, said to be typical of registrations of works of art possessing utilitarian aspects." Among the examples noted by the court were other lamp bases and lighting fixtures upon which copyright registrations were issued during that 40-year period. Significantly, the Register's brief mentioned jewelry as one of the works which had been accepted for registration prior to 1948. At page 29 of the *amicus* brief it is stated:

> "* * * As Mr. Justice Holmes pointed out in Bleistein v. Donaldson Lithographing Co., 188 U. S. 239, 250:
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> "'Personality always contains something unique. It expresses its singularity even in handwriting, and a very modest grade of art has in it

> something irreducible, which is one man's alone. That something he may copyright unless there is a restriction in the words of the act.'
>
> "Where the work, strictly speaking, does not lie within the historical concept of the fine arts, but is closely allied thereto—as is the case with jewelry, enamels, glassware and tapestry—the Office will reject an application only if a reasonable man might say that there was an entire absence of artistic craftsmanship notwithstanding the presence of pleasing functional design. For example, the Office has registered some claims to copyright in jewelry, • • •."

Defendants' contention is untenable that the lamp bases in the *Mazer* case, *supra,* are to be distinguished from jewelry pieces because of the fact that jewelry pieces are submitted for copyright registration with pins, catches and other incidental utilitarian parts fitted to them. This argument overlooks the very essence of copyrightability as stated in §202.8, which on its face contemplates the registration of artistic works with utilitarian parts. The Regulation expressly states that it is the "form but not (the) mechanical or utilitarian aspects" which is copyrightable. Plaintiffs do not claim copyright protection on the attaching devices for their jewelry any more than plaintiffs in the *Mazer* case claimed protection on their shades, wiring and sockets. The testimony of Arthur Fisher, the Register of Copyrights, relied upon by the 4th Circuit in the *Mazer* case (204 F. 2d at page 476) readily indicates the significance of the above quoted portion of §202.8, where he states:

> "• • • The phrase 'insofar as their form but not their mechanical or utilitarian aspects are concerned' is interpreted by the office and by our examiners to permit them to deal only with the question of whether the work is a work of artistic craftsmanship, and they consider, it is our practice to consider as immaterial whether the work may also have a mechanical or utilitarian aspect."

If defendants are to insist that petty distinctions be made between the utilitarian features of lamps, as con-

trasted with jewelry, it is clear that in ordinary usage the utilitarian components of lamps are far more dominant than the incidental catches or pins on jewelry. One thing is certain. If, by chance, plaintiffs actually did obtain design patents, defendants would now be urging this Court that they should have obtained copyrights.

(c) The validity of copyrights on costume jewelry has been considered and sustained consistently by the District Judges in this Circuit.

The entire legislative, administrative and judicial philosophy of copyrightable "works of art", as crystallized in the *Mazer* case, was applied specifically to artistic jewelry in *Trifari, Krussman & Fishel, Inc.* v. *Charel Co., Inc.*, S. D. N. Y. 1955, 134 F. Supp. 551. Although the defendants therein raised substantially the same defenses as are raised by the instant defendants, Judge Bicks, in a carefully considered opinion, sustained the validity of the copyright on costume jewelry and granted a preliminary injunction, stating in part (at p. 553):

> "* * * Costume jewelry may express the artistic conception of its 'author' no less than a painting or a statue. Original individual expression whether in the form of sculptured plaster show dogs, F. W. Woolworth Co. v. Contemporary Arts, 1 Cir. 1951, 193 F. 2d 162, affirmed 1952, 344 U. S. 228, 73 S. Ct. 222, 97 L. Ed. 276, chimpanzee dolls, Rushton Co. v. Vitale, 2 Cir. 1955, 218 F. 2d 434, or a piece of costume jewelry is entitled to copyright protection and generally that right is not dependent upon judicial appraisal of its artistic merit. * * * There is neither basis in the Copyright Act nor judicial precedent for excluding costume jewelry from works of art to which copyright protection may attach. * * *"[5]

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[5] Defendants have quoted completely out of context the article by Mr. Sam B. Warner, former Register of Copyrights, in The Jewelers' Circular-Keystone (Sept. 1948). Mr. Warner stated:

> "* * * The early copyright acts covered only books and things akin to books. The present statute, however, also covers motion pictures, music, photographs, prints and labels, and in Class G 'Works of art; models or designs for works of art." Former registers always accepted paintings and statues as works of art

The *Trifari* case has been followed uniformly in the Southern District since it was decided in September, 1955.

Hollywood Jewelry Mfg. Co., Inc. v. *Dushkin*, S. D. N. Y. 1955, 136 F. Supp. 738

Trifari, Krussman & Fishel, Inc. v. *B. Steinberg-Kaslo Co.*, S. D. N. Y. 1956, 144 F. Supp. 577

Castlecliff Inc. v. *Capri Jewelry, Inc.* (Civil Docket No. 108-169, decided April 24, 1956 by Judge Murphy, preliminary injunction granted)

Significantly, defendants have cited no judicial, legislative or administrative authority denying the right to copyright artistic jewelry. Supporting the copyrightability of artistic jewelry, on the other hand, are a clear and unambiguous mandate from Congress, established Copyright Office practice, a lawfully adopted Regulation of the Copyright Office, a Supreme Court decision upholding that regulation, and decisions by at least five District Judges in this Circuit upholding the validity of copyrights on jewelry.

(d) The Boucher pieces in suit are original works of artistic craftsmanship created by the utilization of standard art techniques.

The copyrighted jewelry pieces designed by Marcel Boucher and involved in this suit evidence originality and a utilization of standard art techniques characteristically employed in the creation of works belonging to the traditional fine arts.

The undisputed trial testimony shows that Marcel Boucher, personally, has been a designer of jewelry for

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regardless of how poor these works were. For the most part they also accepted book-ends and ash-trays that were more or less artistic. I cannot see why if a book-end or an ashtray can be a work of art, it is impossible for a piece of jewelry to be a work of art. In fact, I cannot see why a piece of jewelry may not be just as much a work of art as many of the paintings and statues that everybody will admit to be works of art. Certainly the fact that jewelry has utility, if it has, is not the deciding factor, because nobody from his day to this has doubted that Benvenuto Cellini's saltcellar was both a work of art and a dispenser of salt."

almost 45 years (P. 2a). After studying applied design, modelling and sculpture in France, he served as an apprentice to some of the leading jewelers in Paris, and subsequently executed assignments of great importance, including the design of jewelry for European royalty (P. 2a). Marcel Boucher et Cie., now a partnership composed of Marcel Boucher and Jeanne Boucher, and the licensee of the Boucher copyrighted works, was formed in 1936 and is engaged in the manufacture and sale of original costume and precious jewelry (R. 6, 7). The plaintiff firm numbers among its customers the leading retail stores throughout the country (R. 10-13).

Typically, Mr. Boucher commenced the conception of the pieces in suit by making a series of rough sketches and then full color sketches until the desired modulation and artistic effect were obtained (P. 3a). The resulting designs were then given to a model maker, who turned out a handmade model in metal (P. 3a). Part of the surface of the pieces was created by the use of twisted copper wire and other materials laboriously applied by hand (P. 4a). The handmade model was then placed in a rubber mold and a master casting made (P. 4a). The master casting was then used for making the finished works published with the notice, © Boucher. The master castings of the basic designs were always used for making the pieces with rhinestone trim, by merely preparing the edges to receive the stones (R. 23; P. 7a). Even in the minutest details of line and configuration, the pieces with rhinestone trim embody the artistic effect of the basic designs. The development of a piece from the original rough sketch to an artistically modulated finished product is a long and tedious process, a process completely bypassed by defendants, who were able to capture the entire artistic effect of the Boucher pieces by the simple expedient of using the finished pieces as models (P. 21a, 23a). Stripped of all of defendants' contrived explanations and defenses, the plain fact is that all the defendants had to do was bring the store-bought pieces back to their shop, put them in rubber molds, take orders, and sell their Chinese copies by the gross. As said

by this Court in *King Features Syndicate* v. *Fleischer*, 2 Cir. 1924, 299 Fed. 533, 535: "Doing this is omitting the work of the artisan, but appropriating the genius of the artist * * *."

The procedures employed in the original design of the pieces in suit closely follow the art techniques used in the production of the statuettes in the *Mazer* case, *supra*, to which the Supreme Court accorded great weight.[6] By the use of such techniques, the resulting jewelry pieces take as many artistic forms as imagination may conceive.

By seeking to apply patent standards, defendants misconceive the essential principles of copyright.

Defendants urge that the art of applying "rope texture" to jewelry is old, implying that by reason of the use of a particular surface treatment on 11 admittedly different and original artistic forms, plaintiffs have attempted to obtain a "monopoly" on the use of the surface materials. By this argument defendants evidently seek to apply *patent* principles, and misconceive completely the narrow protection afforded by copyright, as distinguished from the broad protection afforded by patents.

Stated in its broadest terms, "a copyright on a work of art does not protect a subject, but only the treatment of a subject." *F. W. Woolworth Co.* v. *Contemporary Arts*, 1 Cir. 1951, 193 F. 2d 162, affd. 1952, 344 U. S. 228. To be valid, a design patent "must disclose a high degree of uniqueness, ingenuity and inventiveness," as distinguished from a copyright which may be registered if the work is "original," *i.e.*, if it owes its origin to the "author." *Burrow-Giles Lithographic Co.* v. *Sarony, supra.* This Court has carefully noted the distinction in *Alfred Bell & Co.* v. *Catalda Fine Arts*, 2 Cir. 1951, 191 F. 2d 99, where, in a well-considered opinion, Judge Frank stated, at pp. 102, 103:

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[6] "* * * One of the respondents created original works of sculpture in the form of human figures by traditional clay-model technique. From this model, a production mold for casting copies was made * * *" (347 U. S. at page 202).

"* * * 'Original' in reference to a copyrighted work means that the particular work 'owes its origin' to the 'author.' No large measure of novelty is necessary. Said the Supreme Court in Baker v. Selden, 101 U. S. 99, 102-103, 25 L. Ed. 841: 'The copyright of the book, if not pirated from other works, would be valid without regard to the novelty, or want of novelty, of its subject-matter. The novelty of the art or thing described or explained has nothing to do with the validity of the copyright. * * *

"It is clear, then, that nothing in the Constitution commands that copyrighted matter be strikingly unique or novel. * * * All that is needed to satisfy both the Constitution and the statute is that the 'author' contributed something more than a 'merely trivial' variation, something recognizably 'his own.' Originality *in this context* '*means* little more than a prohibition of actual copying.' No matter how poor artistically the 'author's' addition, it is enough if it be his own. * * *

"On that account, we have often distinguished between the limited protection accorded a copyright owner and the extensive protection granted a patent owner. So we have held that 'independent reproduction of a copyrighted * * * work is not infringement', whereas it is *vis a vis* a patent. * * * The 'author' is entitled to a copyright if he independently contrived a work completely identical with what went before; similarly, although he obtains a valid copyright, he has no right to prevent another from publishing a work identical with his, if not copied from his. A patentee, unlike a copyrightee, must not merely produce something 'original'; he must also be 'the first inventor or discoverer.' 'Hence it is possible to have a plurality of valid copyrights directed to closely identical or even identical works. Moreover, none of them, if independently arrived at without copying, will constitute an infringement of the copyright of the others.'"

See also:

Rushton v. *Vitale,* 2 Cir. 1955, 218 F. 2d 434, 435.

Defendants' attempt to dissect the Boucher pieces in suit into the different physical materials of which they are composed distorts the entire concept of copyrightability established by the cases. The Cellini saltcellar is no less

an original work of art because it is made of gold, a material used in the jewelry art since time immemorial. The entire concept of art, as surely embodied in the Boucher pieces, is the expression of an idea through the tasteful combination of a number of constituent physical materials into an integrated artistic design. This is what is copyrightable—not the idea itself, nor the physical materials used. *King Features Syndicate* v. *Fleischer, supra.* In every sense of the word the pieces in suit are indeed the writings of Marcel Boucher.[7]

The skills which an artisan might apply to the physical manufacture of a piece of jewelry and treatment of surface materials, must be contrasted with the over-all artistic expression, the feeling for line, grace and beauty which the designer seeks to capture by applying a combination of materials and imagination to his design. It is thus not without significance that jewelry design has, historically, attracted the talents of some of the worlds greatest artists and sculptors.[8]

In *Jungersen* v. *Baden,* S. D. N. Y. 1947, 69 F. Supp. 922, 928, Judge Rifkind, in ruling upon the validity of patents relating to the casting of jewelry, commented on the interest which Benvenuto Cellini had in the jeweler's art as follows:

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[7] In *Burrow-Giles Lithographic Co.* v. *Sarony, supra,* 111 U. S. 53, 58, the Supreme Court upheld a copyright on a photograph, stating: "By writings (in the Constitution) is meant the literary productions of those authors, and Congress very properly has declared these to include all forms of writing, printing, engraving, etching, &c., by which the ideas in the mind of the author are given visible expression."

[8] In Rogers and Beard, *"5000 Years of Gems and Jewelry",* Frederick A. Stokes Company (1940), the authors trace the evolution of the jeweler's art, and point out that in the Renaissance goldsmiths, being unable to apply creative imagination to jewelry, were obliged to employ leading artists for that purpose. At page 96 it is stated: "The practice of using patterns designed by draughtsmen, instead of by the goldsmiths themselves, was followed also in France and Germany; and designs for jewelry were made by the leading artists of the day, Albert Durer, the great German artist, among others. * * *"

"Cellini was undoubtedly a sculptor, but I doubt the jewelers would have regarded him an intruder in their midst.[6]

"6. Cellini's first apprenticeship was to a goldsmith. At home he was employed on jewelry. Is his celebrated salt-cellar in the sculptor's or the jeweler's art?"

Plaintiffs wish to make clear that they do not contend that defendants are precluded from applying so-called "rope texture," or any other surface material, to their own designs. Plaintiffs would welcome competition from any original designs defendants may undertake to produce and offer to the public[9]. What plaintiffs vehemently object to, and what they are lawfully entitled to prevent, is intellectual piracy—defendants' barefaced appropriation of the original artistic concepts embodied in the Boucher copyrighted pieces.

The District Court properly held that Exhibit F was a different art representation and design from defendants' earrings (Exhibits 50 and 51), and that Exhibits 50 and 51 were copied from plaintiffs' earrings (Exhibits 6 and 7) protected by Copyright GP 7115 G.

The District Judge's proper application of the basic principles of copyright, as expressed in the Supreme Court and Second Circuit cases, is illustrated by the findings of fact and law challenged in Point 4 of defendants' Brief. The District Judge properly found as a matter of law and fact that there is "no similarity in design or art representation" between plaintiffs' earrings in suit (Exhibits 6 and 7), and an uncopyrighted pair of earrings with a "hobnail" surface (Exhibit F) sold by plaintiffs' affiliate, Marboux, Inc., on August 30, 1955, many months after the infringements had taken place (D. 29a).

[9] The answer to defendants' apologia for design piracy as set forth in the newspaper article in their Brief (p. i), is clearly given by the opinion of Judge Learned Hand in *Fred Fisher, Inc.* v. *Dillingham*, S. D. N. Y. 1924, 298 Fed. 145, 150.

Despite defendants' unqualified admission that they made every one of their infringing copies (Exhibits 50 and 51) from Boucher originals (Exhibits 6 and 7) purchased by them in retail stores (D. 38a), defendants now suggest in their Point 4 that their infringing copies were made from some uncopyrighted "hob-nail" earrings. It is incredible that the defendants now venture to make this suggestion, in view of the uncontrovertible evidence that the Marboux "hob-nail" earrings were not put on the market until August 30, 1955, long after the infringements had occurred (D. 196a-201a). The only plausible explanation for this attack on GP 7115 G, as well as the other unfounded defenses asserted by defendants relating to the Boucher earrings, is that the infringing earrings constituted a large percentage of defendants' sales of their infringing articles.[10]

The learned District Judge's finding that the Marboux "hob-nail" piece (Exhibit F) embodies a design and art representation dissimilar to both the Boucher copyrighted pieces (Exs. 6 and 7) and defendants' identical copies thereof (Exs. 50 and 51) is fully supported by the cases. As stated in *Alfred Bell & Co.* v. *Catalda Fine Arts, supra,* Exhibit F is a "distinguishable variation" of the pieces involved in the suit, and its publication by Marboux in August, 1955 is of no significance.

It is apparent on visual examination of the pieces that the combination of texture and design on Exhibits 6, 7, 50 and 51 constitutes the expression of an idea different from that expressed by the combination of "hob-nail" and design on Exhibit F, and the District Court so found. Since

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[10] Exhibit J before the special master (R. 649) shows that Steinberg-Kaslo sold 51,036 pairs of the earrings infringing Copyright GP 7115, G, which accounted for over 15% of the sales of the infringing articles. The hearings before the special master were protracted considerably by reason of Steinberg-Kaslo's submission of a "proposed" statement of infringing sales (Ex. 4 before special master; R. 649) which understated sales of earrings by almost 50%. Defendants later submitted a correct statement (Exhibit J) after plaintiffs had compelled production of Steinberg-Kaslo's outside vacuum-plating contractor's records (R. 1611, 1612, 1820; Ex. 18 before special master).

Exhibit F was not copyrighted, defendants were, of course, free to copy it; and, by the same token, since it differed in artistic expression from Exhibits 6 and 7, plaintiffs were free to market it, without suffering loss of their copyright on the different design embodied in Exhibits 6 and 7. Be that as it may, the admission of defendants that Exhibits 6 and 7 were used by them to make their Exhibits 50 and 51 (D. 38a), is conclusive on the issue of infringement of Copyright GP 7115 G.

(e) The District Court's finding of fact that the Boucher jewelry pieces in suit are original works of art is fully supported by the evidence.

The overwhelming weight of the evidence in the record supports the District Judge's findings of fact that the Boucher works are original works of artistic craftsmanship (D. 155a; P. 17a). It is submitted that even if the standards of works of the "fine arts" were applied to the pieces in suit, they would qualify as such by reason of the designer's qualifications, the art techniques used, and the uncontroverted expert testimony. Moreover, the District Judge's conclusion of law that the Boucher pieces are "works of art" is supported by convincing evidence of public acceptance (R. 287, 302). As stated by Mr. Justice Holmes in the landmark case of *Bleistein* v. *Donaldson Lithographing Co., supra*, 188 U. S. at page 251:

> "It would be a dangerous undertaking for persons trained only to the law to constitute themselves final judges of the worth of pictorial illustrations, outside of the narrowest and most obvious limits. At the one extreme some works of genius would be sure to miss appreciation. Their very novelty would make them repulsive until the public had learned the new language in which their author spoke. It may be more than doubted, for instance, whether the etchings of Goya or the paintings of Manet would have been sure of protection when seen for the first time. At the other end, copyright would be denied to pictures which appealed to a public less educated than the judge. Yet if they command the interest of any public, they have a commercial value—it would be

bold to say that they have not an aesthetic and educational value—and the taste of any public is not to be treated with contempt. It is an ultimate fact for the moment, whatever may be our hopes for a change. That these pictures had their worth and their success is *sufficiently shown by the desire to reproduce them without regard to the plaintiffs' rights.* * * * " (Emphasis supplied)

Possibly the most eloquent confirmation of the artistic worth of the Boucher pieces is defendants' calculated selection of the 25 most popular pieces for copying.[11] The continuance of the infringements after institution of suit is consistent with the plain fact that the Boucher pieces had a decided artistic attraction for the defendants and their customers. Having profited from substantial sales of their infringing copies, it is indeed with ill-grace that defendants now assert that the Boucher pieces are neither original nor artistic.[12]

POINT III

The addition of non-copyrightable matter to a copyrighted work does not require or permit separate copyright.

It is well settled that copyright covers the author's own original treatment of the subject, and that a new copyright cannot be obtained by the mere addition to the work of some non-copyrightable matter.

Mazer v. *Stein, supra*
F. W. Woolworth Co. v. *Contemporary Arts, supra*

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[11] Exhibit 23 in evidence before the special master (R. 649) shows that the 25 Boucher pieces in suit were by far the biggest sellers of a much larger group of copyrighted pieces sold by Marcel Boucher et Cie. before the infringements occurred.

[12] Exhibit J in evidence before the special master (R. 649) shows that only an infinitesimal portion of the infringing copies (3.3%) were sold "off-price" by the manufacturing defendants. Exhibit J reflects sales of the infringing jewelry from May 1, 1955, to and including December 31, 1955. Most of defendants' sales were made after suit was instituted on July 7, 1955.

Shapiro, Bernstein & Co. v. *Jerry Vogel Music Co.*, 2 Cir. 1947, 161 F. 2d 406; cert. den. 331 U. S. 820

Andrews v. *Guenther Pub. Co.*, S. D. N. Y. 1932, 60 F. 2d 555

The District Court considered and properly rejected the arguments advanced in Points 5, 7 and 8 of defendants' Brief to the effect that the Copyright Act requires separate copyright registrations on each of the 25 pieces in suit. It is to be noted that defendants do not cite a single case in support of these Points. It is respectfully submitted that the "facts" as stated by defendants in support of Points 5, 7 and 8 of their Brief find no basis on the record. To the contrary, the record points up the fact that the "rhinestone" defense was also belatedly contrived by defendants in an attempt to distract attention from their acts of deliberate piracy.

The brief answer to defendants' contention is that ornamental trim such as rhinestones or simulated gems does not make a work of art. The copyright is on the artistic creation and the component artistic parts of that creation. A piece using the same artistic lines of the original conception though ornamented with stone trim or reduced or enlarged in size is nonetheless the same design and protected by the copyright on the original work. To hold otherwise would defeat the broad protection intended for artistic works in the Copyright Act. As the Court stated in *King Features Syndicate* v. *Fleischer, supra* (at pp. 535, 536):

> "We do not think it avoids the infringement of the copyright to take the substance or idea, and produce it through a different medium, and picturing in shape and details in sufficient imitation to make it a true copy of the character thought of by the appellant's employee. Doing this is omitting the work of the artisan, but appropriating the genius of the artist. • • •
> • • •
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> "The statuary, made of materials, expressed the sculptor's concept of beauty, and the picture expresses the artist's concept of beauty. The concept

> of beauty expressed in the materials of statuary or drawing, is the thing which is copyrighted. That is what the infringer copies. The Copyright Act was intended to prohibit the taking of this conception. The Copyright Act protects the conception of humor which a cartoonist may produce, as well as the conception of genius which an artist or sculptor may use. Hill v. Whalen (D. C.) 220 Fed. 359."

In *F. W. Woolworth* v. *Contemporary Arts, supra,* 193 F. 2d 162, a single copyright registration was issued on a sculptured work depicting a cocker spaniel in show position. Plaintiff marketed three different embodiments of the work all produced from one master mold, and described by the Court as follows (at p. 163):

> "One of the embodiments relied upon is a buff colored plaster model about nine inches long by seven inches high which sold at retail for $4.00; another is a slightly smaller (about eight by six inch) red porcelain model which sold at retail for $9.00, and the third is a hand-painted black and white porcelain model which retailed for $15.00."

In flatly rejecting the defense that protection could be secured only on the particular embodiment of the work actually registered, the Court restated the legal concept of copyright and concluded (at p. 164, 165):

> "Here the 'something irreducible' • • • was certainly not a matter of subject, nor was it a matter of size or material, nor even of color • • •. Here 'something irreducible' was shape. • • • It means the proportion, form, contour, configuration and conformation • • •.
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> "There is ample evidence in the record that the plaintiff's dog and the Woolworth one embody the identical intellectual or artistic conception • • •."

Although plaintiffs herein sought to separately register all of the pieces in suit (R. 55, 82-91, 155), the Copyright Office issued the 11 certificates to cover both the plain pieces without trim and the pieces which were embodiments of the plain pieces, except for the addition of the non-copyrightable trim (P. 8a). The testimony of Mr. Kaminstein of the Copyright Office (D. 213a) shows that the acceptance

of one piece out of several embodying the same artistic design was in accordance with the well established practice of that office.

The presumption of regularity and compliance with the Act attending the rulings of the Copyright Office (*Remick Music Corp. v. Interstate Hotel Co.*, D. C. Nebr. 1944, 58 F. Supp. 523, affd. 8 Cir., 157 F. 2d 744, cert. den. 329 U. S. 809) and its issuance of 11 certificates is amply supported by the record, and the District Judge's findings of fact No. 2 and 3 (D. 152a, 153a) were correct as to all of the pieces in suit. The evidence showed that plaintiffs used the same hand-made models to make both the plain pieces and their counterparts with the stone trim (P. 7a; R. 23), and that the notice of copright, impressed into the molds from which they were made, was identical on all pieces (R. 118, 119).

Visual examination of plaintiffs' pieces with rhinestone trim, Exhibits 3, 7, 11, 18, 21, 26, 27, 34 and 37, compared with their counterparts accepted for registration by the Copyright Office, Exhibits 2, 6, 9, 17, 20, 25, 33 and 36, shows conclusively that in each case the design of the basic piece was carried over into the rhinestone trimmed piece not only in the graceful and appealing lines and pattern of the original creation but even to the minutest detail and scale of measurement. The addition of the non-copyrightable trim no more changed the artistic conception of the Boucher pieces than the addition of lamp shades changed the artistic conception of the statuettes in *Mazer v. Stein, supra.*

Similarly, an examination of plaintiffs' earrings designated Exhibits 28 and 29 shows that these pieces are merely a reduced version, in the same proportions and with the same lines, of the artistic design embodied in plaintiffs' pin, Exhibit 25.

While the plain copy of the work or the same copy with rhinestone trim may appeal more to one woman than to another, visual examination shows that from the standpoint of the intellectual and artistic elements there is no difference between the two counterparts of the same work.

Defendants' conduct in making their Chinese copies belies their claim of difference between the trimmed and the untrimmed versions. Defendants' recognition of the identity of design in the pieces with and without trim is demonstrated by the fact that in every case they pirated not only the piece with the trim but also the piece without the trim. Moreover, the manufacturing defendants' sales of 326,880 infringing copies were almost equally divided between the plain pieces and the pieces with the trim.[13]

POINT IV

Plaintiff's have complied with all of the notice requirements of the Copyright Act and Regulations.

The cases are legion holding that the purpose of a copyright notice is to apprise innocent persons unaware of the copyright, so as to prevent them from incurring infringement penalties. The requirements of notice have never been applied by the courts as immutable technicalities for the purpose of assisting a deliberate infringer who is unconcerned as to whether a work is copyrighted or not.

Burrow-Giles Lithographic Co. v. *Sarony, supra*

Shapiro Bernstein & Co. v. *Jerry Vogel Music Co., Inc., supra*

Fleischer Studios v. *Ralph A. Freundlich, Inc.*, 2 Cir. 1934, 73 F. 2d 276

Werckmeister v. *Springer Lithographing Co.*, C. C. S. D. N. Y., 1894, 63 F. 808

Hollywood Jewelry Mfg. Co. v. *Dushkin, supra*

Ziegelheim v. *Flohr*, E. D. N. Y., 1954, 119 F. Supp. 324

Baron v. *Leo Feist, Inc.*, S. D. N. Y., 1948, 78 F. Supp. 686, affd. 2 Cir. 1949, 173 F. 2d 288.

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[13] The statement of the manufacturing defendants' sales of the infringing jewelry (R. 649; Ex. J before special master) shows that Steinberg-Kaslo's sales of the plain pieces and the pieces with the stone trim were substantially equal. Of the 2,270 10/12 gross of infringing pieces sold by Steinberg-Kaslo, 1,027 2/3 gross were "tailored" pieces and 1,243 1/6 gross were "semi-tailored" pieces.

Although defendants have raised almost every conceivable question relating to the sufficiency of plaintiffs' notice of copyright, the record is replete with evidence showing plaintiffs' sincere and conscientious purpose to protect the original Boucher works by all lawful means, and their strict and literal compliance with all of the technical requirements of copyright. Opposed to this has been deliberate infringement and wanton indifference as to whether the Boucher pieces were protected by copyright or not. It is submitted that there is absolutely no merit to a single one of the plethora of technical defenses addressed to the sufficiency of the copyright notice on the Boucher pieces.

(a) Plaintiffs complied with the notice requirements of the Act with respect to the 4 copyrights covering 10 works published on June 14, 1954, as well as the 7 copyrights covering 15 works published on January 2, 1955.

There is no evidence in the record to support defendants' conclusory statement in Point 6 of their Brief that all or any of the 10 works published by plaintiffs on June 14, 1954 and covered by the 4 copyrights issued on September 21, 1954, were published without proper notice. The District Court properly found that all of the 10 works referred to, as well as the 15 works published on January 2, 1955, were published with a sufficient notice of copyright, "© Boucher" (17 U. S. C. 19).

The evidence shows that in May, 1954, prior to the publication of any of the pieces in suit, Mr. Boucher went to the Copyright Office for the purpose of discussing the requirements of copyright and insuring that he was complying wth all necessary technical provisions (R 85, 155; P. 5a). At the time, the pieces in suit were only a portion of the Boucher pieces being prepared for introduction to the public in the fall of 1954. Mr. Boucher was advised that he should not use a symbol or trademark with his initials inside a so-called "Phrygian helmet," but that he should use the notice "© Boucher" (R. 142). Thereupon all pieces in the process of manufacture and in stock were marked with the "© Boucher" notice before sales to the public were made (R. 141-147; D. 31a).

Physical Exhibit L, referred to on page 39 of defendants' Brief, is merely a casting of earrings No. 5807, not a finished production piece, and the record clearly shows that all completed pairs of these earrings (Exs. 6, 7) were published and sold with the " © Boucher" notice (R. 146). As heretofore pointed out, the manufacturing defendants' sales of their copies of Exhibit 6 constituted over 15% of their total sales of all infringing copies, thus accounting for the fact they have addressed still another unfounded argument to the validity of the Boucher copyright thereon (Ex. 8). It is of considerable significance that defendants did not even attempt to show that a single one of the Boucher originals purchased by them in retail stores bore anything but a clear and proper notice " © Boucher". The evidence clearly supports the District Judge's factual finding that none of the works in suit were published without the proper statutory notice (P. 9a, 19a).

In their search for a refuge defendants attempt to attach significance to the fact that a certificate of doing business was filed by Marcel Boucher d/b/a Boucher on August 10, 1954. Even assuming that the New York State Penal Law provision applies, the name "Boucher" is not an assumed name. The oblique suggestion of defendants that they might have been unaware of Marcel Boucher's identity as the copyright owner because a certificate was not on file prior to August 10, 1954, is sheer pettifoggery. The defendants' own witness, Steinberg, testified at the trial that the Boucher original pieces were purchased in April, *1955* (R. 180). At the hearings before the special master, another one of the manufacturing defendants' partners, Hyman Slovitt, testified that the infringing copies were shown for the first time at a trade show on May 1-10, *1955*, and that the first sales were made at that time (R. 1780; p. 1129 of testimony before special master). When asked if the Boucher pieces were shown to customers prior to the trade show, the witness testified positively that he purchased the Boucher pieces in retail stores just before the show (P. 23a).

Inasmuch as there is no other jewelry firm with the name Boucher in New York, and inasmuch as the infringed pieces were not even purchased by defendants in retail stores until approximately eight months after the certificate was filed, defendants indulge in a grotesquerie when they suggest that they may have been misled by a copyright notice bearing Marcel Boucher's surname (P. 9a).

As stated by Judge Swan in *Shapiro, Bernstein & Co.* v. *Jerry Vogel Music Co., supra,* 161 F. 2d at p. 406:

> "* * * The purpose of a copyright notice is to prevent innocent persons who are unaware of the existence of the copyright from incurring the penalalties of infringers by making use of the copyrighted work * * * " (citing cases).

That a surname or trade name is a sufficient notice of the identity of a copyright proprietor is also well settled by the cases. In *Hollywood Jewelry Mfg. Co., Inc.* v. *Dushkin, supra,* plaintiff's copyright certificates on artistic jewelry were issued in the name of Hollywood Jewelry Mfg. Co. d/b/a Hollycraft. In holding the notice "© Hollycraft" sufficient in form, Judge Edelstein stated:

> "The omission of the corporate name in no way disguised the identity of the party who had registered the copyright. Indeed, the notice as given would seem to reveal that identity, inasmuch as the trade name appears to have been in widespread use by the plaintiff for a period of years. 'The purpose of the statute's requirement as to notice is to prevent innocent persons who are unaware of the existence of the copyright from suffering for making use of the copyrighted article. * * * A reasonable construction of the statutory requirement shows that the name of the copyright proprietor is sufficient in form, if it gives notice of copyright to one who is looking for the truth and who desires to avoid infringement. * * * "

In *Ziegelheim* v. *Flohr, supra,* the court held that a copyright notice on a book merely bearing the surname, "Ziegelheim", was a sufficient designation of the copyright proprietor. See also *Fleischer Studios* v. *Ralph A. Freund-*

lich, Inc., supra; Werckmeister v. *Springer Lithographing Co., supra.*

The District Judge properly held that plaintiffs duly published the 25 works covered by their 11 copyrights with a sufficient statutory notice of copyright.

(b) A copyright notice on only one of two physically separate but interdependent articles, such as a pair of earrings, constitutes a sufficient notice under Section 10 of the Act, where earrings are designed, manufactured and sold and purchased with an intended use as pairs.

The District Judge carefully considered the question of whether a pair of earrings constitutes one "work" within the contemplation of Section 10 of the Act (P. 20a). His findings of fact and law that a pair of earrings constitutes but one "work," and that a proper notice of copyright was affixed to each pair of Boucher earrings published and offered for sale, are amply supported by the evidence and the decided cases. By urging that a copyright notice on but one of a pair of earrings is insufficient, defendants would introduce into the law of copyright a blind subservience to form, completely divorced from reality and the purposes sought to be accomplished by the Act. Significantly, it is to be noted, defendants do not cite a single case supporting their jerry-built argument with respect to the Boucher earrings.

The Boucher earrings to which defendants' Point 2 is addressed are as follows: Exhibits 17 and 18, which are covered by Certificate No. GP 7849 G (Exhibit 19); Exhibits 36 and 37, covered by Certificate No. GP 7851 G (Exhibit 38); and Exhibits 28 and 29, covered by Certificate No. GP 7866 G. (Exhibit 30).

Exhibits 28 and 29 are the only pairs of earrings for which protection is claimed on a copyright issued on a pin of the same basic design (Exhibit 25). The other earrings were separately registered as such, and do not purport to embody the basic design of a matching pin or other piece.

Each pair of earrings copyrighted by plaintiffs constituted only one work of art. Each pair was designed, manufactured, sold and copyrighted as a whole. One earring of a pair was never sold separately (D. 10a, 13a). Plaintiffs' original and artistic design cannot be severed into two works of art merely because the two earrings of a pair are physically separate. Earrings have been made and used in pairs at least as far back as ancient Egyptian times.

Each Boucher pair of earrings was presented as one artistic work, and was so submitted to the Copyright Office for registration (D. 10a, 13a). The marking of the copyright notice thereon was examined by the Copyright Office and satisfied the requirements of that office.

The decided cases interpreting Section 10 of the Act indicate clearly that plaintiffs' marking of one notice on a pair of earrings fully complied with the statute.

In *Patterson* v. *Century Productions,* 2 Cir. 1937, 93 F. 2d 489, cert. den. 303 U. S. 655, a jungle picture film was arbitrarily divided, for convenience, into reels which could be satisfactorily shown separately. Each reel showed interdependence of all. The notice of copyright was only on the first reel. This Court held that the film was copyrighted as a whole and notice of copyright only on the first reel was sufficient to protect the whole film. The Court said (at p. 493):

> "This picture was copyrighted as a whole under one title and the first reel did bear a sufficient notice. The division of the picture into reels was more or less arbitrary for convenience in handling, and, although there were subtitles and such incoherence that reels could be shown separately with reasonable satisfaction, we do not understand that the appellants suggest that any reel failed to show on its face the interdependence of all. We therefore think that, in the absence of express provisions to the contrary, the picture should be treated as one so far as notice is required making the one notice the picture bore as effective as though each reel had been separately so marked."

In *Lydiard-Peterson Co.* v. *Woodman,* 8 Cir. 1913, 204 Fed. 921, a copyright was obtained on a directory with a separate map contained in a pocket of the book. The book and the map were referred to as a 'map-directory' and were intended to be used together. The book contained a proper notice of copyright, but the map did not. The infringer copied only the map. It was held that the notice of copyright in the book was sufficient to protect the map as well. The Court said (at p. 924):

> "But we are of the opinion that in this case the book or Directory and the map are one production, and that the Directory includes the map. We fail to find a material difference whether the map is inclosed in the pocket to the Directory, or whether it is stitched or otherwise fastened to the cover, or elsewhere in the Directory. On the map is the hyphenated word 'Map-Directory', showing that it is of itself not complete. To use it, the figures necessarily carry the reader to the book or Directory. And on the title page of the book are the same words 'Map-Directory'. These carry the reader to the map."

Even if the Boucher earrings had been sold separately, which is not in fact the case, the decision in *Hoague-Sprague Corporation* v. *Frank C. Meyer Co.,* E. D. N. Y. 1929, 31 F. 2d 583, holds that the copyright on the whole work remains valid. In that case the plaintiff obtained a copyright on its decorative wrappers for shoe boxes. The whole wrappers bore the copyright notice, but the plaintiff had subsequently furnished certain end labels bearing no copyright notice. The defendant copied the whole wrapper and was held liable for infringement. The Court rejected the defendant's contention that the copyright on the whole wrapper had been lost by the plaintiff's publication of the separate end labels without the copyright notice thereon. The Court said (at p. 586):

> "Defendant's contention that plaintiff's copyright, even if valid, has been vitiated by reason of the subsequent publication by plaintiff of certain end labels, which bore no copyright notice, is not sustained.

> "Plaintiff copyrighted the whole wrap, and while the publication of a portion thereof, to wit, the end label, unless it be covered by section 20, title 17, U. S. C. (17 USCA §20), doubtless vitiates any claim to copyrighted protection on that particular part so published. (Herbert v. Shanley Co. (C. C. A. 229 F. 340), the plaintiff did not, by that publication, lose the protection of the copyright to the wrap as a whole, nor did defendant gain the right by such publication of a part to appropriate to itself the entire copyrighted wrap."

The English case of *Fielding* v. *Hawley* (*1883*), 48 L. T. 639, 47 J. P. 582, is pertinent in this connection. There the complainants manufactured a butter dish in two parts consisting of a dish and a cover. The registration mark required by the Copyright (Design) Act, 1842, was legibly stamped on the dish alone, but not on the cover, which was separate and apart from the dish and not in any way attached thereto. The *entire* design was on the *cover*. The then statute (Section 4 of 5 and 6 Vict. C. 100) provided for placing the registration mark on every "article of manufacture." Defendants urged that the dish and cover were two separate articles and each should have been marked. Rejecting this contention, Field, *J.* stated:

> " * * * As regards the second question, what is meant by the butter dish? It is referred to just before in the second objection as 'the butter dish and cover'; and further back it is called 'a butter dish in two parts, viz., a dish and cover.' That is the way it is described in the case. We must now look at the Act. Its object is to secure that potters, and lay persons as well, may know whether any particular design belongs to anyone else. The Act says you shall not have the right to these penalties unless the distinguishing registration mark is on each article of manufacture. * * * The mark may be put on by means of a label. Is it contended that there must be a label on each cover as well as dish? What is an 'article of manufacture'? What have the complainants here manufactured? If they manufactured dishes and covers separately and to be sold separately, probably then there might be two articles of

> manufacture. A soup tureen and a vegetable dish, though belonging to one dinner set, are clearly two articles of manufacture. The question is, Is it a single article divisible into parts, or are they separate articles? Clearly this was the former. If the magistrate had found that this was a contrivance to make two articles, which were meant to be sold separately, but at the same time to escape from marking them both, then the case would be different. In this case the dish is marked, but not the cover—which is the principal? The dish seems to be so, and it is marked in the usual place, and so the mark is sufficient."

Metro Associated Services v. *Webster City Graphic, Inc.*, D. C. Iowa, 117 F. Supp. 224, and *Deward & Rich* v. *Bristol Savings & Loan Corporation*, 4 Cir. 1941, 120 F. 2d 537, cited by defendants, are not in point. In the *Metro* case, advertising mats were published with a patently defective copyright notice, while in the *Deward & Rich* case the Court held that the serial publication of a book in a monthly magazine prior to any steps being taken towards securing a copyright, vitiated a copyright on the whole book obtained subsequently.

Defendants sought to substantiate their contention at the trial by introducing testimony to the effect that earrings can be used separately as dress ornaments. Nevertheless, it is clear on the record that the marketing of interchangeable pieces with an intended double use is unique. The defendants' witness, Irving Kandell, admitted that he sold his devices to the garment trade (D. 53a), and that they sold for 37½¢ each, with three on a card (D. 57a). The witness further testified that if one of his devices dropped off a dress, the wearer would lose the entire value of the dress (R. 271). This statement seems to be conclusive of a highly specialized use. But in any event, whether Mr. Kandell's "Changettes" were sometimes used as earrings, or whether Mr. Boucher's earrings might by some woman be used as clips, defendants cannot sensibly suggest that any jewelry manufacturer would ever market an item to be used as a single earring.

Plaintiff, Boucher, testified fully and frankly on the subject. He testified that it is conceivable that an earring with the usual earring clasp on back could be used as a dress ornament but only if the wearer did not care about losing it (R. 278, 279). Thus an earring rising to the status of a work of art would not in the normal course of events be worn as a dress ornament because of the risk of loss. Mr. Boucher further testified that where a piece is designed and sold with an intended use as a dress ornament it is customary to place a proper clip-back on the piece having two points or prongs to hold on to the dress (R. 273-275, 282; D. 9a).

It is significant that defendants failed to introduce any evidence of the manner in which they marketed their imitations of the Boucher earrings, nor was there any evidence to refute the fact that the defendants sold their pieces as earrings. Visual examination of defendants' copies of the earrings (Plaintiffs' Exhibits 46, 47, 50, 51, 57, 58, 62 and 63) shows that they are mounted on cards containing two cut-outs for attaching a pair of earrings. These cards are the actual cards used by defendants in selling the imitation earrings as is demonstrated by the fact that the above-described earring exhibits were delivered to plaintiffs by the defendants pursuant to subpoena served in connection with the pre-trial depositions. Some of the wholesaler defendants, notably Volupte, Inc. and Du Boyes, Inc., placed the two earrings on cut-out cards bearing their own names. In each instance defendants made and sold a left and a right earring whenever the Boucher original pair had a left and a right earring.

It is thus clear that defendants manufactured and sold their earring pieces in the same manner and for the same purposes as the plaintiffs—as earrings.

There is no evidence on the record that the defendants were misled as to the purpose for which the Boucher original earrings were made or sold. On the contrary, the evidence shows the defendants to be experienced firms in the costume jewelry business, and it is clear that when the

Boucher originals were purchased in retail stores for the purpose of making imitations, they were recognized as pairs of earrings and copied as pairs of earrings. Since defendants failed to come forward with any evidence to show that the copyright notice was missing from one of the Boucher pairs of earrings used as models for their imitations, as a matter of law they are bound by the form of notice employed by plaintiffs.

POINT V

A copyright covers the component artistic parts of a work of art, and plaintiffs' copyrights entitled them to protection against defendants' copying of material and substantial artistic elements of plaintiffs' designs. The District Court properly held that defendants' necklaces (Exhibits 52 and 53) infringed plaintiffs' copyright GP 7109 G.

Defendants infringed Boucher copyright GP 7109 G, issued on plaintiffs' necklace No. 5831 (Ex. 13), by appropriating material and substantial artistic components thereof. The District Court properly rejected the argument advanced in Point 3 of defendants' brief by holding that defendants' necklaces (Ex. 52 and 53) were copied from and were infringements of the Boucher necklaces covered by Copyright GP 7109 G (Ex. 16). It is clear from the express provisions of Section 3 of the Copyright Act and from the decided cases that the copyrights issued to plaintiffs protected both the pieces embodying the basic design in its entirety, and the pieces embodying a component artistic part or parts of that design, viz.: "The copyright provided by this title shall protect *all the copyrightable component parts* of the work * * *" By analogy, there could be no doubt that a painter who copied but one figure of a Michelangelo painting of a group had plagiarized the original creation of the artist.

Section 3 of the Copyright Act protects each original part of the work that could be the subject of copyright. Plaintiffs' copyright GP 7109 G (Ex. 16) protects not only the

bow closing figure of the necklace (Ex. 13) but also the artistic design of the flexible figures on both sides of the necklace. In the artistic appeal of the necklace these side figures stand out as prominently and essentially as the closing bow. Defendants' selection of the side figures for copying, in their Exhibits 52 and 53, is clear admission of the artistic value and appeal of these component parts in plaintiffs' work.

In plaintiffs' three versions the artistic design of these component side figures in Exhibit 13 is repeated in Exhibits 14 and 15. Indeed, the only difference is the bow closing ornament in Exhibit 13 and the rhinestone trim in Exhibit 15. Defendants' witness, Irving Kandell, testified on direct examination that Exhibits 13, 14 and 15 are similar in artistic design (R. 265).

Examination of the three necklaces demonstrates that this recurring design of the side figures is identical in measurement and detail in each of the three pieces. The side figures for Exhibits 13, 14 and 15 were all made at the same time and from the same model (R. 43; P. 6a, 7a). Plaintiffs filed separate copyright applications for each of the three necklaces, but the Copyright Office ruled that only one copyright was issuable and necessary to protect the three pieces because the same design appears on each side of all three (P. 6a).

Similarly, plaintiffs' copyright GP Nos. 7855 G and 7847 G (Exs. 22 and 32) protect against infringement by defendants' bracelet Exhibit 61, where defendants have borrowed two-thirds of plaintiffs' pin (Ex. 20) covered by GP No. 7855 G and the artistic figuration making up the two sides of plaintiffs' necklace (Ex. 31) covered by GP No. 7847 G.

Each instance cited above was a material and substantial copying of plaintiffs' copyrighted work. In these circumstances the courts have held that the copyright owner is entitled to protection against such piecemeal pirating of parts of the copyrighted work. If defendants are given free license to select and copy artistic parts of one copyrighted piece, or to borrow and put together artistic parts from several copyrighted pieces, then the inevitable result

will be to destroy the value of copyright in the artistic jewelry field.

In *Markham* v. *A. E. Borden Co.*, 1 Cir. 1953, 206 F. 2d 199, an advertiser collected data on refrigeration supplies and conceived a lucid and forceful description by arrangement in advertising catalogs of essential data. The catalogs contained hundreds of items. Although the defendants had copied only 9 items, the Court found that the defendants were liable for infringement of the plaintiff's copyright which was on the whole catalog. The Court said (at pp. 201-202):

> "• • • A broader protection is • • • clearly within the language of §3. An original achievement in the publication of a trade catalog, such as in this case the authorship of a comprehensive library, concisely describing the function and utility of refrigeration supplies, would have to be protected as to all component parts in order for the protection to be meaningful. Otherwise, if only the whole catalog were protected, and not each of its parts, then various wholesalers could select just a few items from the copyrighted catalog, according to each wholesaler's particular inventory, or according to each wholesaler's particular preference for certain illustrations or descriptions. If such a selective pirating were allowed by applying the 'material and substantial' test to the whole catalog rather than to each of its parts, then the copyright on the catalog would seem to have very little value. Such a result would be inconsistent with the policy of protecting original achievements in this area and the statutory language does not indicate that such a result was intended."

Harry Alter Co. v. *A. E. Borden Co.*, D. C. Mass. 1954, 121 F. Supp. 941, involved three types of piecemeal copying of certain illustrations from copyrighted trade catalogs for refrigeration equipment. The Court said (at p. 944):

> "• • • In some instances these illustrations were taken just as they appeared in the Alter catalogs, in some cases part of the Alter illustrations were combined with parts of illustrations from other sources, and in other instances the Alter illustration

was cut up and the parts rearranged to produce an illustration superficially different from the Alter original. • • •

"• • • In the light of the case of *Markham* v. *A. E. Borden Co., Inc.*, 1 Cir. 206 F. 2d 199, the basic principles of law to be applied in deciding the question are clear. The Alter catalogs are works made up of original descriptions and illustrations of separate items of Alter's stock in trade. Each such item in the catalog is a component part protected by 17 U. S. C. A. §3. The material and substantial copying of even one such item is sufficient to constitute an infringement of the copyright. • • • "

In *King Features Syndicate* v. *Fleischer, supra,* the plaintiff was the owner of the copyright of a book of cartoons featuring "Barney Google and Spark Plug." The defendant manufactured and sold a toy horse fashioned after "Spark Plug," but did not copy the other principal characters of the copyrighted work. In holding that the plaintiff was entitled to a preliminary injunction against this infringement, the Circuit Court stated (299 Fed. at p. 535):

"Section 3 of the Copyright Act of March 4, 1909 (35 Stat. 1075 Comp. St. §9515), provides protection for all the copyrightable component parts of the thing copyrighted, and the proprietor has all the rights in respect thereto which he would have, if each part were individually copyrighted under the act. The courts have given this meaning to this section. *Da Prato Statuary Co.* v. *Guiliani Co.* (C. C.) 189 Fed. 90; *Mail & Express Co.* v. *Life Pub. Co.,* 192 Fed. 899, 113 C. C. A. 377. Copying is not confined to a literary repetition, but includes various modes in which the matter of any publication may be adopted, imitated, or transferred with more or less colorable alteration. The disguise of the source from which the material was derived does not defeat the protection of the copyright, nor does taking a part of the work constitute an evasion of the copyright. *Lawrence* v. *Dana,* Fed. Cas. No. 8, 136, 4 Cliff. 80. The appellees did not take all of the copyrighted matter, or all its principal characters, but took one, the idea of the horse 'Sparky.' "

During the trial of the instant case the Court pointed out (R. 122-124) that the copyright notice on Exhibits 13 and 31 was on the center motif and not on any of the link figures on the two sides of these necklaces. Exhibit 31 was not filed for copyright until 1955. Exhibits 14 and 15 embodying the link figures of Exhibit 13 were filed for copyright in 1954 at the same time as Exhibit 13, but were ruled by the Copyright Office to be covered by copyright on Exhibit 13.

On Exhibit 13 and again on Exhibit 31, plaintiffs affixed the copyright notice on the largest available surface of the piece in accordance with plaintiffs' policy, testified to at the trial, of giving clear and readable notice and affixing that notice through imprint in the mold, wherever possible, rather than through manual stamping (R. 65, 118-119). To affix the notice to one of the side link figures of Exhibits 13 or 31 would involve manual stamping of one of the repetitive links and would require a smaller notice in the narrow space available.

Only one notice on a piece is required by Section 10 of the Act, to protect both the artistic design in its entirety and each of the component artistic parts thereof, consisting in this instance of the artistic side design as well as the center motif as discussed above in this Point V. It is submitted that the place where the notice is affixed on the above-mentioned Exhibits can in no way limit the scope of the respective copyright.

POINT VI

The District Court's award of defendants' profits and an attorney's fee was well within the limits of the Court's discretion under Sections 101(b) and 116 of the Copyright Act.

It is respectfully submitted that the award to plaintiffs of defendants' profits aggregating $21,776.89 constitutes a comparatively modest recovery in the light of the tremendous sales of the infringing jewelry enjoyed by the

manufacturing defendants in particular, the deliberate continuance of infringement after suit had been instituted, and the damage sustained by plaintiffs. Although defendants have appealed from the final judgment, their arguments relate solely to the propriety of the interlocutory judgment, and it may be presumed that defendants' noticeable failure to challenge the special master's calculation of profits and damages indicates their satisfaction with the amount awarded upon the finding of infringement of 11 copyrights. Similarly, the award of an attorney's fee of $10,000 to plaintiffs is not challenged on any specific grounds, and it is submitted that such fee was also eminently fair and reasonable in the light of the services rendered by plaintiffs' counsel in pretrial proceedings, a vigorously contested trial, and a lengthy accounting before the special master (R. 1840).

In the light of the recent pronouncement of the Supreme Court in *F. W. Woolworth Co.* v. *Contemporary Arts, supra,* 344 U. S. 228, endorsing the broad application of statutory damages in copyright infringement cases,[14] it is probable

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[14] In the *Woolworth* case the Supreme Court affirmed an award of statutory damages in the amount of $5,000 and a counsel fee of $2,000 against an *innocent* infringer who had made a profit of only $899.16 on 127 dozen infringing dog statues, where plaintiff had a gross business of only $35,000 and showed little or no damages. Here the special master found that the Boucher firm sustained lost sales of $186,218.00 on 25 infringed pieces alone, as the result of the infringements (P. 29a). The Supreme Court in the *Woolworth* case stated (at page 233):

> "Moreover, a rule of liability which merely takes away the profits from an infringement would offer little discouragement to infringers. It would fall short of an effective sanction for enforcement of the copyright policy. The statutory rule, formulated after long experience, not merely compels restitution of profit and reparation for injury but also is designed to discourage wrongful conduct. The discretion of the court is wide enough to permit a resort to statutory damages for such purposes. Even for uninjurious and unprofitable invasions of copyright the court may, if it deems it just, impose a liability within statutory limits to sanction and vindicate the statutory policy."

Section 101(b) (17 U. S. C. 101(b)) permits statutory damages in the case of jewelry to be assessed at "$1 for every infringing copy made or sold or found in the possession of the infringer * * *"

that the evidence before the special master supports an award of at least $5,000 against the manufacturing defendants for each of the 11 copyrights infringed. *Westermann Co.* v. *Dispatch Printing Co.*, 249 U. S. 101 (1919). The jobber defendants, with the exception of Arke, Inc. (P. 13a), being equally guilty of deliberate infringement, it is submitted that awards of statutory damages against them in the amounts set forth in the special master's report (P. 29a) would have been appropriate herein.[15] Cf. *Shapiro, Bernstein & Co.* v. *Goody*, 2 Cir. 1957, 248 F. 2d 260.

It is further respectfully submitted that plaintiffs are entitled to an additional allowance for the services of counsel on this appeal. (17 U. S. C. 116; *Sheldon* v. *Metro-Goldwyn Pictures Corp.*, 2 Cir. 1939, 106 F. 2d 45, affd. 309 U. S. 390)

CONCLUSION

The interlocutory judgment and the final judgment of the District Court should be affirmed.

Respectfully submitted,

FORSYTHE, MCGOVERN & FETZER,
Attorneys for Plaintiffs-Appellees.

THOMAS A. MCGOVERN,
BURTON L. KNAPP,
Of Counsel.

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[15] The parties entered into a stipulation before the special master herein with respect to the *jobber* defendants' profits only (P. 28a), and without affecting their liability for actual or statutory damages (R. 1641) if the special master awarded damages. The jobber defendants sold the following quantities of the infringing copies: Volupte, 18,880 copies; Capri, 10,728; Du Boyes, 8,644; Arke, 2,416 and Heimler, 2000.

APPENDIX

Excerpts from Testimony

(1) UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

Civ. 102-19

[SAME TITLE]

Before:

HON. SYLVESTER J. RYAN,

District Judge.

New York, November 26, 1956;
2.00 o'clock p.m.

Appearances:

FORSYTHE, MCGOVERN & FETZER, Esqs.,
Attorneys for Plaintiffs;
THOMAS A. MCGOVERN, Esq., and
BURTON L. KNAPP, Esq., *of Counsel.*

MAXWELL E. SPARROW, Esq.,
Attorney for Defendants;
MAXWELL E. SPARROW, Esq., and
WILLIAM V. PESCE, Esq., *of Counsel.*

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(2) MARCEL BOUCHER, one of the plaintiffs, called as a witness on behalf of the plaintiffs, being first duly sworn, testified as follows:

Direct Examination by Mr. Knapp:

• • • • •

Q. Mr. Boucher, what is your occupation? A. I am a designer and a jeweler by occupation.

Marcel Boucher—for Plaintiffs—Direct

Q. Mr. Boucher, would you care to tell the Court some things about your background and experience as a designer and jeweler. (3) A. What do you mean, starting back—

Q. Starting with your schooling. A. Oh, well, after high school—prior to high school I took some private designing lessons, and right after high school I entered a school of art applied to industries. The name of that school was Bernard Palissy which is a school, I would say, similar to the Union Cooper School here in New York City—Cooper Union in New York City.

When I was graduated from these schools where I learned designing applied to industry, that was textile, wallpaper, I mean all types of—then modelling, wax modelling also and sculpture.

After that I entered as an apprentice with one of the leading jewelers in Paris at the time which was Lalique, and I started to learn the trade as a jeweler, and I also start to learn the designing of jewelry at the same time. That was right prior to the war.

After I was out of the Army, in 1919, I was connected with one of the best jewelers in Paris, and I came in this country in 1925 working for the same concern. While I was with that jeweler in Paris, although I was rather in my (4) twenties, you know, I was considered one of the best jewelers in the trade and was including making jewelry for the British Court back in 1922, I think it was, and I made a necklace for the Princess Mary—for the marriage of the Princess Mary with the Duc de la Caze back in 1922, if I am not mistaken.

For the same concern that I was working in Paris I came to New York, and I start to work for this concern in New York. I have all my training with the precious jewelry. I wasn't doing anything with the costume jewelry at the time.

In 1925 I came to this country, and right from the beginning I was working as a jeweler when I came in this coun-

try, you see, for a period of about a year. Then I enter another leading jeweler, manufacturer, where I was as sort of a supervisor, making—doing designs and jewelry and working at the bench at the same time also.

The Court: Was this all making original pieces?

The Witness: That was original pieces.

The Court: Not making models for production?

The Witness: At the time that was on (5) precious jewelry. We didn't do that type of work.

The Court: All right.

• • • • •

(28) *By Mr. Knapp*:

Q. Mr. Boucher, with respect to Plaintiffs' Exhibit 2 in evidence and the certificate of copyright thereon issued by the Copyright Office on September 21, 1954, when was Plaintiffs' Exhibit 2 in evidence designed by you? A. It was designed in the spring of 1954.

Q. Would you briefly describe, Mr. Boucher, (29) the technique with which you designed Plaintiff's Exhibit 2 in evidence. A. Well, first we do make rough sketches of the pieces that we intend to make and from these rough sketches we start to establish one design until the design is proper for production facilities, you know—

The Court: You give a design to your model maker, do you?

The Witness: That's right.

The Court: And he turns out a model of your pin or product in white metal, is that right? Does he use white metal?

The Witness: Sometimes white metal; sometimes sterling, sterling silver.

The Court: He doesn't use sterling any more, does he? It is too hard to handle.

The Witness: Certain times we use copper because we get more sharpness in the copy.

The Court: That is your model, is it?

The Witness: That's right.

The Court: And then you take that model, and from that model you do your casting.

The Witness: You make what we call a master casting. We do not always use the model directly for (30) our production, you see.

• • • • •

(31) Mr. Knapp: I introduced this as Plaintiffs' Exhibit 5.

(32) Mr. Sparrow: No objection.

(Plaintiffs' Exhibit 5 for identification received in evidence.)

Q. I want to ask you, Mr. Boucher, is Plaintiffs' Exhibit 5 an actual production mold from which Plaintiffs' Exhibits 2 and 3 were manufactured? A. Yes.

Q. I show you a piece within that exhibit marked 5878, and I wish to ask you how that piece was made. A. Could you give me the model of this piece? You have it there.

Q. 5877. A. And also the model of the 5928.

Well, in this piece, after the model maker got the outline of this piece and give the proper modulation, we use a twisted wire of copper, copper wire, and that twisted wire is filed so and applied one by one all over the surface of this particular piece, to form this texture.

This is very tedious work, you know, and it takes quite a long time to do it. Then after the piece is rhodium plated and the models are rhodium plated, and they are placed in the piece of crude (33) rubber to make the impression, then those two discs are—those two discs of rubber that you have—are used after as a mold.

• • • • •

Marcel Boucher—for Plaintiffs—Direct

(49) *By Mr. Knapp:*

Q. Mr. Boucher, with respect to Plaintiffs' Exhibits 6, 7, 9, 10, 13 and 14 in evidence and 2 and 3 in evidence, are those all the pieces involved in this suit on which you obtained copyrights in the fall of 1954? A. They are.

Q. Mr. Boucher, at the time that you sought to obtain copyrights on those four pieces to which I have just referred, did you take the matter up with the officials at the United States Copyright Office? A. That's right. Before applying—

Q. Just answer my question yes or no. A. Yes, we did.

Q. At the time that you registered the four pieces which we have just referred to, which are the basic designs, did you attempt to register any other versions of those pieces? A. We tried to register every piece.

The Court: Let me ask you specifically: Did you file a formal application to get a certificate of registration on the design depicted in Exhibit 14?

The Witness: Yes.

Q. Have you got that copy, or have you got (50) that application that you filed? A. Yes. This is the application, yes (indicating).

The Court: He is pointing to a photograph.

Mr. Knapp: The Judge is referring to this piece (indicating).

The Witness: We were advised—

The Court: I am not asking you whether or not you were advised. I asked you a simple question. Did you file an application for a certificate of registration for copyright of the article or of the design shown in Exhibit 14?

The Witness: Yes, we did, your Honor.

The Court: Do you have a copy of it, a certified copy of that paper that you so filed?

The Witness: Well, that copy has been rejected due to the fact that—

The Court: Never mind "due to the fact."

The Witness: It was rejected by the Patent Office because the same design on Exhibit 13 on the side of the necklace appears on Exhibit 14 in here (indicating). The same pieces—this is the model, you know, and we are using the same model to make that necklace, so we get the copyright (51) on this one—

Mr. Knapp: Point out the numbers.

The Court: 13.

The Witness: Exhibit 13, and the fact that the side pieces—

The Court: The flexible units on that?

The Witness: Yes, as used to make this necklace. They would give us the copyright on that and tell us to put the same copyright notice on this one because these things are exactly the same, and so are these exactly the same as these (indicating).

The Court: The flexible units, then, you are pointing out to me—

The Witness: Are exactly the same on both necklaces.

The Court: If you will give me a chance, Mr. Boucher. You say that the flexible units on Exhibit 13 are the same as the flexible units as compose Exhibits 14 and 15?

The Witness: That's right.

The Court: And they are made from the same mold.

The Witness: That's right, from the same die.

(52) The Court: From the same die.

The Witness: Yes.

The Court: This center unit on Exhibit 13, this bow effect, that is not reproduced in any part of Exhibit 14 or 15.

The Witness: No.

The Court: How did you achieve the effect here of the ornamentation with the rhinestone settings? Will you explain that operation to us?

The Witness: Well, we do take a casting of the original model, which is a plain model, and we prepare that casting that we call after that the master casting, and we lay the rhinestone on this master casting, and this master casting in turn is used as a model, is put in the mold and used to manufacture this particular one.

The Court: That is, to make the units of Exhibit 14, you took the same units which you had used in 13 and 14—

The Witness: That's right.

The Court: —and drilled this center piece so that it might be prepared to receive the rhinestone.

The Witness: That's right.

(53) The Court: And then you made your castings from—

The Witness: From the master casting.

The Court: —the model, the same model on which you had drilled these holes for these rhinestones?

The Witness: That's right.

The Court: All right.

* * * * *

By Mr. Knapp:

Q. Mr. Boucher, did you prepare or have prepared separate copyrights for Plaintiffs' Exhibits 14 and 15? A. We do prepare. We do apply. We did apply for them, yes.

Marcel Boucher—for Plaintiffs—Cross

Q. What happened to those applications? A. Well, they were returned to us with the explanation that these two necklaces were covered by the application of the Exhibit 15.

The Court: You mean 13.
The Witness: 13; I am sorry.

Q. Mr. Boucher, I show you what purports to be (54) a certificate of registration on a piece entitled 5798 and ask if that was issued by the Copyright Office? A. It was.

The Court: What have you done with that certificate? Have you offered it in evidence?
Mr. Knapp: No, Judge. I want to illustrate a point with some other photograph.
The Court: I don't want any illustration of this. You are just encumbering the record. Does this involve a piece in suit?
Mr. Knapp: No.
The Court: Then the Court sustains its own objection as being immaterial.

Q. Was it on the basis of the ruling of the Copyright Office with respect to the September copyrights, Mr. Boucher, that you followed a procedure with respect to the copyrights on items which were copyrighted in the spring of 1955? A. No. In fact, in the spring of '55, to be sure we continued to apply for copyright on every item.
Q. Did the Copyright Office continue to return to you all except the basic designs? (55) A. That's right. They always picked the plainest design, the basic design.

* * * * *

(91) *Cross Examination by Mr. Sparrow*:

* * * * *

(126) The Court: As I understand from your testimony yesterday, you said that there was a time

when you began to manufacture these pieces which are in suit here, and you marketed them without any notice of a copyright.

The Witness: Not the pieces involved in this suit.

The Court: They were other pieces which had been copied, you say?

The Witness: Oh, that was many times because we only started to apply for a copyright in the spring of 1954.

The Court: No. But did you ever do it with reference to any of the pieces involved in this suit?

The Witness: No, no.

* * * * *

(139) Mr. Sparrow:

* * * * *

Q. Can you try to recollect as clearly as you can or as closely as you can when you first started to do business under the trade name of Boucher? A. Well, as a matter of fact, for many, many years—I mean, when it comes to advertising and publicity, many people are not mentioning their first name. They are mentioning Boucher.

* * * * *

(157) JULES STEINBERG, called as a witness on behalf of the plaintiff, having been first duly sworn, testified as follows:

Direct Examination by Mr. Knapp:

Q. Mr. Steinberg, are you a partner of the defendant B. Steinberg-Kaslo Company? A. Yes, sir.

* * * * *

Q. Mr. Steinberg, I show you Plaintiffs' Exhibit 44 for identification and ask you if that piece of jewelry was manufactured by B. Steinberg-Kaslo Company. (158) A. It looks like our work.

Jules Steinberg—for Plaintiff—Direct

Q. I beg your pardon? A. It looks like our work.
Q. Is it your piece? A. It might be.

Mr. Knapp: I would like to introduce in evidence—

The Court: Is there any dispute about it, Mr. Sparrow?

Mr. Sparrow: I was going to suggest shortening this because, if they show us the pieces, we might admit that is our manufacture.

Mr. Knapp: We hope to do that as soon as possible.

The Court: Suppose we get this down. Do you concede that this piece, 44, is of the manufacture of Steinberg-Kaslo Company?

Mr. Sparrow: We will have both of them confer.

Mr. Knapp: That is plaintiff's Exhibit 4 of the depositions.

The Court: It has your signature on it.

The Witness: It does look like our piece.

Q. I didn't ask you that, Mr. Steinberg.

(159) Mr. Sparrow: We will get this straightened out.

The Court: All right. It is conceded that that is their manufacture.

Do you offer it in evidence?

Mr. Knapp: Yes, as Plaintiffs' Exhibit 44.

The Court: It is received.

(Plaintiffs' Exhibit 44 for identification received in evidence.)

The Court: This relates to what exhibit of plaintiff's manufacture?

Jules Steinberg—for Plaintiff—Direct

Mr. Knapp: It relates to Plaintiffs' Exhibit 20 and 21.

• • • • •

Q. Mr. Steinberg, will you tell the court (160) how that piece was made? A. That piece was bought by my partner.

Q. Where was it bought? A. Pardon me?

Q. Where was the piece bought? A. One of the stores uptown. I can't tell you which store it was because I don't know.

Q. Was it a retail store? A. That's right.

Q. Was it a Boucher piece that he bought?

Mr. Sparrow: I object to that, your Honor, on the ground that he is talking about the piece manufactured by the defendant.

The Court: No. He says it was made from a piece that Steinberg's partner, Kaslo—

The Witness: Al Slovitt—

The Court: —How does he spell his last name?

The Witness: S-l-o-v-i-t-t.

The Court: That his partner, Al Slovitt, bought in a retail store in New York.

Q. Was it a piece just like that? A. I don't remember. I don't think it is.

Q. Did it have pearls in it? (161) A. It may have had pearls. I believe it had pearls in it.

Q. Where was the piece manufactured by Marcel Boucher?

Mr. Sparrow: I object to that question. He said he did not buy it.

The Court: Overruled. He saw it. Is there any dispute about it, Mr. Sparrow, that this piece is a copy of the Boucher piece?

The Witness: Yes.

The Court: It is a copy.

Jules Steinberg—for Plaintiff—Direct

Q. It was manufactured by Boucher? A. I believe it was.

• • • • •

Q. Did the piece that your partner bought in the store contain a little inscription on the back, it looked like a C in a circle, with the name Boucher? (162) A. I did not see it with any inscription in the back because my work is production.

Q. I asked you another question, Mr. Steinberg. I asked you if the piece your partner bought in the store had that inscription of a C with a circle and the name Boucher? A. That I can't answer.

• • • • •

(242) The Court: You maintain that some of this merchandise ordered by the defendant Volupte from Steinberg-Kaslo was shipped after the commencement of this suit?

Mr. Knapp: That's correct, Judge. It (243) is true of the other defendants.

The Court: Was it shipped to Volupte after they had been served with process in this suit?

Mr. Knapp: Yes.

Mr. Sparrow: That's right.

The Court: Is that conceded?

Mr. Sparrow: Yes. There were some shipments.

The Court: All right. That is conceded.

Mr. Sparrow: Yes, sir.

The Court: Then is it conceded that, if the Court finds infringement, that none of the defendants were innocent of the claim of infringement at the time of their marketing?

Mr. Sparrow: I don't know whether all of the defendants—

Mr. Slovitt, did you make shipments to all of the defendants after suit?

Mr. Slovitt: I would say offhand yes. But then we got some back from a few houses such as Arke.

Jules Steinberg—for Plaintiff—Direct

The Court: I don't like to get statements in response to a question repropounded to counsel—I don't like to get statements from the litigants themselves. It doesn't make for the concession (244) in law that we seek. Suppose we have the stenographer read my question to you as counsel, and you answer yes or no, because it seems then that that is an important matter here, and it might save further proof.

Mr. Sparrow: Yes.

Will you read the question now to Mr. Sparrow?

(Question read.)

Mr. Sparrow: The answer is—we will concede that we sold the defendants after suit was commenced with the exception of the goods which were shipped to one of the defendants, Arke, which were returned.

The Court: But that doesn't answer my question. I am concerned—when I ask this question—with the liability of the defendants other than Steinberg-Kaslo for infringement, if such an infringement is found. If they were innocent, were without knowledge, that might affect their liability.

Mr. Sparrow: They had knowledge of a suit and they had knowledge of the fact that the items were copyrighted after suit was commenced.

The Court: And did they thereafter market (245) some of the products which are claimed to have been infringing products?

Mr. Sparrow: Yes, with the exception of Arke, who returned the merchandise.

The Court: All right.

• • • • •

Colloquy

(293) New York, December 12, 1956,

(Trial resumed)

Mr. Knapp: May we proceed, Judge?

The Court: Yes.

Mr. Knapp: Or do you have some suggestions?

The Court: No, you may proceed.

Mr. Knapp: I will address myself directly to the technical points as they were raised by the Court during the course of the trial. I will preface it by just one comment on one factor which, we submit, bears on the determination of a lot of the technical copyright questions.

The evidence here clearly points to nothing less than deliberate copyright infringement by the defendants and all of them.

The Court: There is a deliberate copying. There is no question about that.

Mr. Knapp: There is not a shred of evidence—

(294) The Court: There is a deliberate copying and I find there is notice of copyright.

Mr. Knapp: And not a shred of evidence, I may add, to indicate that the defendants were in any way misled.

The Court: I so find that there was a deliberate copying.

• • • • •

(297) Mr. Knapp: • • • • •

The evidence showed that the earrings, the Boucher earrings, were designed at the same time, they were manufactured at the same time, they were sold at the same time, and were copyrighted at the same time as pairs of earrings.

The defendant copied them as pairs of earrings.

It is true, the pieces are physically (298) separate, but the evidence at the trial made clear that there

is no separate use of earrings. It is clear that it is impossible to go into a store and buy one earring; you buy a pair of earrings, just like you would buy a pair of shoes, or a pair of gloves, or a pair of cuff-links.

* * * * *

All of the American cases which we have cited in our trial brief, or the brief we submitted Friday, involving physically separate items which were intended to be used together, have held that (299) notice on one piece is sufficient. * * *

Section 10 of our Copyright Law merely says that you can obtain copyright by publishing a work and by putting the copyright notice on copies of that work.

I think the evidence at the trial, with all the facts and circumstances, make clear that a pair of earrings is a whole, it is one work, and the notice on one earring is sufficient.

(300) There is not a single case involving physically separate pieces which were intended to be used together which held that both inter-dependent units must have the notice.

* * * * *

Mr. Knapp: I would like to conclude this earring point by pointing out that the testimony shows that when the defendants went around to retail stores, for the purpose of buying the piece, to take it back to the shop, to put it in the rubber mold to make their imitation, they bought both earrings of a pair.

The Court: I believe and I find that there was a deliberate copying. I find that the defendant manufacturers had notice of this copyright, that is, Steinberg-Kaslo, and I find that the other co-defendants in the case, the retailers or wholesalers or (301)

distributors had notice of the claim of infringement at the time they purchased from Steinberg-Kaslo.

• • • • •

(307) Mr. Knapp: Yes.

Adverting but one brief moment to the question of the coverage of the bow necklace, there again all the cases that we have cited in our brief, after trial, support our view. An excellent analogy would be, perhaps, *King Features* v. *Fleischer,* where we had Barney Google and Spark Plug, and where the defendant copied Spark Plug but left out Barney Google. That in and of itself was an infringement of one component of the total copyrightable material, which was the figures of Barney Google and Spark Plug together.

You may argue, by analogy, that a painting by Michelangelo might carry, oh, say, half a dozen figures, peoples or animals, and if the defendant deleted four figures and copied two and published the work as his own, that would be no less an infringement than if he copied the entire painting.

We feel that 80 to 90 per cent of the artistic element of the bow necklace piece was lifted out by the defendants and used to make their imitation, which came out like this (indicating).

(308) The *Markham* v. *Burdon* case and the *Alter* v. *Burdon* case illustrate the principle by analogy very clearly in the field of publications where you have a publication which has a number of illustrations.

The defendant cannot exculpate himself from a claim of infringement if he takes out five or six or just a handful of illustrations out of a total publication.

There again copyright extends to the component as well as to the whole.

Colloquy

I would like to conclude this by pointing out that in the case here the component which was appropriated was 80 or 90 per cent of the whole piece and not a fragmentary part of it.

In summation, I would like to say that the evidence at the trial, Mr. Boucher's presentation, showed an earnest determination by him to comply with the statute, to pay scrupulous attention to the details of copyright, to protect his works of art.

Opposed to that there has been wilfull infringement, without excuse, without justification; and that an interlocutory judgment with respect to all eleven pieces should be granted.

Mr. Sparrow: If it pleases the Court, one (309) of our defenses is ruled on to the effect that you believe that costume jewelry is copyrightable under the law.

The Court: Yes, I so rule as a matter of law.

Mr. Sparrow: I have dealt with that somewhat—

The Court: You have submitted a very interesting brief on it and you have done a lot of work on it, and I went over it before the trial, when I read the brief, and during the trial and since the trial, and I conclude that, as a matter of law, the pieces in suit were properly the subject of copyrights which were issued at the time, and I conclude, as a matter of fact, that they were artistic productions which were of sufficient artistic merit to make them subject to the copyright law.

• • • • •

(310) The Court: So we know where we start from, I find that the copyrights on the pieces in suit were lawfully and duly issued and that those pieces were subject to copyright. That I make as a factual finding and as my conclusion.

I find, too, that these other pieces which are

claimed to be a repetition and representation of the basic designs covered by those copyrights were, in fact, covered by those copyrights and that the mere addition of rhinestone ornamentation is not a change in the basic design so as to bring it without the copyrighted subject. That I find.

I find, too, that the defendants had notice of the copyrights issued upon these pieces, and the only issue that is presented here, as far as these defendants are concerned, to me is an issue of law arising from undisputed facts in the case, and that is whether or not any marking on one of a pair of left and right earrings is sufficient compliance with notice under the copyright statute.

• • • • •

(313) The Court: One has a common law right to conduct business under a trade name. This business of filing a certificate in the County Clerk's office is only a requirement of the Penal Law of ıe State of New York.

Mr. Sparrow: Your Honor, they are trying to invoke here a very strict statute. I cited a case in my trial brief where the Court held that it is necessary to comply with the statute in order to invoke the copyright law.

I agree with you that the equities would require him to do nothing about it. Say, for instance, a man does business—there are a lot of them doing business without filing a certificate, (314) but they are invoking a very strict remedy.

The Court: The filing of a certificate of doing business under the firm name in the County Clerk's office is only a penal requirement. One always has that right under the common law, and it has never been taken away from him by statute. It is just a penal provision of the Penal Law.

Mr. Sparrow: Let us assume that to be so, your Honor. How about the—

The Court: There are lawyers today transacting business under their last names. Nothing to stop me from opening up a store and calling it Ryan's.

Mr. Sparrow: I know, but this is a statutory—

The Court: That is only a penal requirement and it doesn't affect the—

Mr. Sparrow: What is your Honor's ruling with respect to the utilization of the Phrygian trademark before, publication before they used a C in a circle with Boucher?

The Court: There is no such evidence in the case. There is no finding there was a marketing?

* * * * *

(317) The Court: If there was a marketing without proper markings or before the copyright issued, there couldn't have issued a valid copyright. I recall no such testimony to that effect, and I find that it did not occur.

I make that factual finding.

Mr. Sparrow: We come to the pieces on where the copyright notice was on only one of a pair of earrings.

Counsel for the plaintiffs cited the map case. Well, I think that case very clearly shows, in the decision, that the court ruled that the map couldn't be used without the book and the book couldn't be used without the map.

He also cited the butterdish case. Well, that is a very old English case, and I don't know (318) whether the requirements there are the same as our requirements. All I do know is this, that there it states that each article is to be marked, whereas our copyright statute provides that each copy shall

be marked, and there is a difference between a copy and an article of manufacture because the butter-dish is a whole, as the cover and the dish.

Furthermore, they are two entirely distinct pieces. Here you have two substantially identical pieces. In some instances they were. Only one marking was on a pair of identical earrings.

The Court: No, but here, Mr. Sparrow, the copyright in this case on the earrings was issued on the pair, on left and right, and there is one copyright to cover the left earring and the right earring, is that correct?

Mr. Sparrow: When the copyright was obtained, when the copyright was issued, I should say you cover both.

The Court: One copyright to cover the left and the right earring?

Mr. Sparrow: Yes.

The Court: Together. We have to apply common sense and we have to apply facts and common knowledge. (319) An earring is readily recognized as such an article by anybody and we also have to recognize and accept and take notice of the fact that earrings are sold in pairs.

Mr. Sparrow: But it is the ornament which is copyrighted, not the earring *per se*.

The Court: It is the combination of left and right earring on which the copyright was issued.

* * * * *

(320) The Court: I have considered the question of whether they are sold and whether they are purchased with the purpose of use as separate items, and I have been inclined to find, and I do find, that notice on one of the pair of earrings is sufficient notice of copyright.

* * * * *

Colloquy

(322) Mr. Sparrow: We come to the question of, and I want to deal with it, Exhibit 6.

* * * * *

(323) The Court: Simply adding rhinestones or similar ornamentation to a basic copyrighted design does not change the design, no more than if instead of adding rhinestones, on this metal portion of the design, they covered it with blue or cerulean enamel, or white enamel, and baked the enamel on the ridge. That wouldn't change the basic design.

The basic design and what is copyrighted here is not the texture. There is nothing new about this twisted rope texture. That is as old as the hills. There is nothing new about it. That is as old as twisted rope. But it is the composite in which the use of this twisted background is purely incidental to the general contour and shape of the whole article. It is the whole article, in which this twisted rope background is just one of many elements, which is copyrighted, and what your client did here, Mr. Sparrow, was not to try to make an imitation, but they went out (324) and they made an identical reproduction by using the plaintiffs' product as a mold, as a model from which to make a rubber mold.

Mr. Sparrow: They made certain changes in it before they used it.

The Court: The changes were only such changes that had to be made in order to make the rubber mold. They took the pin off, they took the texture off, the ridge off, and they took the rhinestones out.

There has been a deliberate pirating by your clients, the manufacturers, and the only question is here whether or not these plaintiffs' products were protected by copyright.

Colloquy

No question but what your people deliberately went out and copied.

• • • • •

(325) Mr. Sparrow: We now come to the claim of the plaintiffs that Exhibits 14 and 15 are covered by the copyright of Exhibit 13.

• • • • •

(329) Mr. Sparrow: If you take Exhibit 15, which is the rhinestone-studded necklace, and you compare it with Exhibit 13, there are certainly distinguishing features between them, ornamental features between them.

The Court: The only difference is that they have taken the links in Exhibit 13 and they have drilled a central beveled portion at the end of each link for rhinestone and fastening of the rhinestone, and the evidence is, that in producing the links of 15, they used the same model as that used for producing the links for 14, after having that model, and they drilled it for rhinestones.

• • • • •

(333) The Court: You recall it was at the time I said something about making the brothers and sisters. In other words, 15 is the sister to the links on 13. You might say that 14 is a brother to the links on 13. They are all part of what is known in the art and what is the testimony of Mr. Boucher, all one family, one family design.

• • • • •

Hyman Slovitt—for Defendants—Redirect

(1023)

42 West 44th Street
Room 602
New York, New York
May 28, 1957
10:30 A.M.

Before:

WILLIAM S. EVANS,

Special Master.

* * * * *

(1099) HYMAN SLOVITT, resumed the stand, and testified further as follows:

Redirect Examination by Mr. Sparrow:

* * * * *

(1101) Q. In other words, you used four hundred and sixty-eight molds for the entire quantity which you had produced, which had been claimed to be infringed? A. That is right.

Q. To infringe the copyrights. A. Yes.

* * * * *

(1130) Mr. Sparrow: Let him finish the question.

Mr. Knapp: Isn't it a fact, Mr. Slovitt, that you show the Boucher pieces to some of your customers long before you delivered the sample orders, for the purpose of obtaining their opinion as to whether or not you should manufacture them?

The Witness: Mention the time.

Mr. Knapp: The answer is yes or no.

The Witness: Mention the time.

Mr. Knapp: Did you ask them—

The Witness: One day prior. One day prior, yes. Mention the time.

Mr. Knapp: Did you ask them for their opinion in December or January, 1954?

The Witness: No, sir. Never picked them up in December.

Report of Special Master

(641) *To the Honorable United States District Court for the Southern District of New York:*

The above-entitled cause was referred to me, as Special Master, by an order of reference, dated January 7, 1957, signed by Hon. Sylvester Ryan, a Judge of this Court, to hear the proof of the parties in relation to damages and profits and to report any findings thereon to the Court.

Pursuant to said order, I have heard the parties and their evidence, and report as follows:

As to the profits of defendants, Jules Steinberg, Morris Kimmelman, Hyman Slovitt, and Samuel Friedman (a partnership, doing business as B. Steinberg-Kaslo Company).

Plaintiffs claim that the profits of these defendants, resulting from the sale of the infringed jewelry, amounted to $34,284.48, and defendants contend that their profits were only $3961.00.

(642) THE NET SALES

Both sides concede that the gross sales were $129,298.00, but plaintiffs ask that $16,576.25 be excluded from the gross sales, for the purpose of calculating profits, because that amount of jewelry was sold at a loss; and plaintiffs contend that they have a right to select the profitable sales and disregard the loss sales for the purpose of calculating defendants' profits, on the sale of infringed jewelry. This legal contention is sound, where it can be applied, but it cannot be applied here. The sales, here, are not separable. Profitable sales are intermingled with unprofitable counterparts, and sales of infringed jewelry are intermingled with

sales of uninfringed jewelry; loss sales are made to induce profitable sales, so that only a guess can disentangle the profitable sales from the unprofitable sales.

I find the gross sales to be in the sum of $129,298.00.

As against the gross sales, I allow defendants $596.00 for returns, and a sales discount of 2%, amounting to $2574.04, on the balance, leaving net sales at $126,127.96.

Computation of Deductions from Net Sales To Determine Profits

In the computation of these deductions, I have not accepted the methods of calculation and accounting of either party. I adopt the facts presented in the federal income tax return of defendants, as showing, more reliably, than the varied estimates of the litigants, the measure of profits that defendants earned, in the sale of the infringed jewelry.

Cost of Goods Sold

As against the net sales, I allow defendants 69.09 per cent of the net sales, as the cost of the goods sold, in the sum of $87,141.80, leaving a gross profit of $38,986.16.

(643)

Indirect Factory Labor

As against the gross profits, I allow defendants 6.39 per cent of the net sales for indirect factory labor, in the sum of $8,059.57.

Factory Expenses

I allow defendants 2.01 per cent of the net sales for factory expenses, in the sum of $2535.17. In figuring these

expenses, I have excluded from consideration defendants' claims for rent, electric protection, depreciation of machinery and equipment and amortization of leasehold improvements, amounting to .95 per cent of the net sales, for the reason that these expenses were constant and non-variable; they would have remained the same, regardless of the manufacture and sale of the infringed jewelry, and made no contribution towards the manufacture and sale of the infringed jewelry, except as to a slight portion of the jewelry, manufactured in the premises, which has not been disentangled, by any credible evidence, from the general operation.

Selling Expenses

I allow defendants 4.12 per cent of the net sales for selling expense, in the sum of $5,196.47. I have, here, excluded defendants' claims for advertising, entertainment, traveling, credit and collections and bad debts, amount to 3.08 per cent of the net sales, for the reason that these expenses were not incurred in the sale of the infringed jewelry, and had no relation to their sale.

General and Administrative Expenses

I allow defendants 2.71 per cent of the net sales for general and administrative expenses, in the sum of $3418.06. In calculating these expenses, I have excluded .28 per cent of the net sales claimed by defendant for legal fees, for the reason that the legal fees were not incurred in relation to the manufacture and sale of the infringed jewelry.

(644) NET PROFITS OF DEFENDANTS FROM THE SALE OF INFRINGED JEWELRY

The total deductions from the gross profits, for the various items of overhead are $19,209.27, which leaves defendants with a net profit of $19,776.89.

SALARIES OF PARTNERS

I have excluded the claim of defendants for partners' salaries, as a deduction from the gross profits, in the claimed amount of $1697.00, or in any proportionate amount of the net sales, for the reason that defendants did not have to pay any salaries for the production of the artistic and creative work of designing; that the manufacturing was not work done by the partners except in a small amount, not separated by any credible evidence from the general operation, but was contracted out of their factory for which due allowance was made heretofore; that only one partner was engaged in selling, but the evidence does not show what part of the selling he did, as to the infringed jewelry, so that his commissions or salary for that work cannot be measured; that, generally, the selling was done by salesmen, who received a commission for their work, for which due allowance has been made heretofore; that their salaries remained constant and non-variable, and would have been paid, regardless of the infringement; that to allow a deduction of partners' salaries, in the circumstances of this case, would be an indirect way of allowing defendants to profit from the infringement.

FEDERAL INCOME TAXES

I have excluded the federal income tax, as a deduction from the gross profits in the claimed amount of $2424, or

in any proportionate amount of the net sales. No evidence has been presented as to the individual income of any of the defendant partners, so as to enable me to determine the amount of taxes they would have to pay by reason of the profits derived from the infringement. It may be that they would have to pay most of these profits, as income taxes, if their income was large, or little or none, if their income was small, and allowable (645) deductions large. In the case of a wilful infringer, the court will not indulge in guessing what their income taxes would be, for the purpose of reducing their liability. The defendants have not met the burden of proof for the allowance of this deduction, and it is, therefore, unnecessary for me to determine whether, in law, defendants are entitled to such a deduction.

Profits of the Five Corporate Defendants from the Sale of the Infringed Jewelry

The parties have stipulated as to the profits of the five corporate defendants. In accordance with the stipulation, I find their profits as follows: (1) Du Boyes, Inc., $402.00; (2) Arke Inc., $98.00; (3) Capri Jewelry Inc., $490.00; (4) Volupte Inc., $916.00; (5) Walter Heimler Inc., $94.00.

As to Damages

As of the date of this judgment, damages were measurable, and fairly certain, although defendant claims that there were none, except fringe damages. Plaintiffs claim that the damage can be measured by three different methods of calculation (1) damages of $73,619, based upon lost sales by reason of the infringement amounting to $270,103 (2) damages of $59,406, based upon lost sales by reason of the infringement, amounting to $217,917 and (3)

damages of $50,755, based upon lost sales by reason of the infringement, amounting to $186,218. In addition, plaintiffs claim injury to their standing in the trade, in the public mind.

I find that plaintiffs lost sales of $186,218.00 by reason of the infringement, but I am unable to accept plaintiffs' method of calculating their damages. The greatest percentage of net profits that plaintiffs earned on their net sales, in any one year, as shown by the evidence, was 5.7 per cent. Upon that basis, their damage amounts to $10,614.43.

(646) The addition of new designs is an annual event in the costume jewelry business, and, each year, old designs together with new designs, are offered for public approval and sale. I can find no reason, in the evidence, for holding that the infringement, by defendants, caused any damage to plaintiffs' reputation and standing in the trade, or any other injury beyond loss of profits on sales it may have made, were it not for the infringement.

Since these damages are less than the profits, I do not undertake to apportion them among defendants, and disallow such damages.

As to Statutory Damages in Lieu of Profits and Damages

Plaintiffs contend that even though there is proof as to profits as well as damages, that the circumstances here warrant a disregard of these proofs, in favor of statutory damages; that the statutory damages here are not limited by a ceiling of $5000.00 for the infringement of each of the eleven copyrights; that damages should be measured by $1.00 a copy for each infringed copy of the design, or $326,880.00, against the partnership defendants, and, vari-

ously, from $18,880.00 to $2,000.00 against the corporate defendants, except, as to defendant Arke Inc., or, in any event damages should be allowed in the sum of $5,000 for each infringement against the partnership defendants, and $5000 against each corporate defendant, except Arke Inc., which merits a lesser amount.

Since the profits here are reasonably ascertainable, and the damages can be easily calculated, I see no occasion for statutory damages. This is not a case where the profits are ascertainable and where the damages are not easily ascertainable, but seem greater than the profits. The damages are ascertainable here and are clearly less than the profits. Statutory damages would result in a penalty. I, therefore, disallow statutory damages.

(647) DEFENDANTS' REQUEST TO REOPEN THE HEARINGS IS DENIED

The hearings were begun January 30, 1957, and closed May 28, 1957. Briefs and reply briefs were exchanged, and the last brief was submitted by defendants, on July 29, 1957, in which they request that the hearings be reopened to permit a witness, Theodore H. Jackson, to testify for the purpose of correcting his testimony. In his testimony before me, he stated that May 26, 1955 was the date of his first purchase of the infringed jewelry. Prior to his testimony before me, he stated, in a deposition before trial, that he saw the jewelry in his place of business at the end of December, 1954. He now wishes to correct his testimony, given in his deposition, to say that he first saw the jewelry, in his place of business, May 26, 1955.

I have denied the request for the reason that the testimony, if corrected and believed, would not alter this report, in any respect.

Report of Special Master

TESTIMONY AND EXHIBITS

Appended to this report is the testimony taken, consisting of 1155 pages; plaintiffs' exhibits 1, 2, 3, 4a, 4b, 4c, 5, 8, 9, 10, 11, 12, 17, 17a, 18, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34; trial exhibits 69, 71; defendants' exhibits H, I, J (two parts), K (three parts), L, M, N1, N2, N3, and P.

Other exhibits are in possession of the parties and too bulky for filing. If relevant the parties will refer to them on consideration of this report.

Dated: New York, N. Y.
August 14, 1957.

/s/ WILLIAM S. EVANS
William S. Evans
Special Master

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IN THE

Supreme Court of the United States

October Term, 1957

No. 1017

DU BOYES, INC., ARKEL, INC., CAPRI JEWELRY, INC., JULES STEINBERG, MORRIS KIMMELMAN, HYMAN SLOVITT, ABRAHAM J. SLOVITT and SAMUEL FRIEDMAN, d.b.a. B. STEINBERG-KASLO COMPANY (sued as JULES STEINBERG and I. SLOVITZ, d.b.a. B. STEINBERG-KASLO COMPANY), VOLUPTE, INC., and WALTER HEIMLER, INC.,

Petitioners,

v.

MARCEL BOUCHER, d.b.a. BOUCHER, and MARCEL BOUCHER and JEANNE BOUCHER, d.b.a. MARCEL BOUCHER, ET CIE.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MAXWELL E. STARROW,
Attorney for Petitioners,
665 Fifth Avenue,
New York 22, N. Y.

J. PRESTON SWECKER,
Washington, D. C.,
Of Counsel.

INDEX TO BRIEF

	PAGE
Opinions Below	2
Jurisdiction	2
The Questions Presented	3
Constitutional Provision	3
Statutes Involved	4
Rules and Regulations of the Copyright Office	7
Universal Copyright Convention	8
Statement of the Case	9
Reasons for Granting the Writ	12
ARGUMENT:	
1. With Respect to Questions 1 and 2	15
2. With Respect to Question 3	21
CONCLUSION	23

INDEX TO APPENDIX

Decision	1a
Judgment	4a

CASES CITED

PAGE

Altoona Publix Theatres v. American Tri-Ergon Corp., 294 U. S. 477 13

American Tobacco Co. v. Wercksmeister (1907) 207 U. S. 284, 28 S. Ct. 72, 52 L. ed. 208 23

Banks v. Manchester, 128 U. S. 244 17

Bobbs-Merill Co. v. Strauss, 210 U. S. 339 17

Caliga v. Inter Ocean Newspaper Co., 215 U. S. 182 17, 22

De Jonge & Co. v. Breuker & Kessler Co., (1910) 182 Fed. 15 affirmed (1914) 235 U. S. 33, 36; 35 S. Ct. 6, 59 L. ed. 113 23

Deward & Rich v. Bristol Savings & Loan Corporation, C. C. A. Va. 1941, 120 F. 2d 537 23

Exhibit Supply Co. v. Ace Patents Corp., 315 U. S. 126, 128 13

Globe Newspaper Co. v. Walker, 210 U. S. 356 .... 17, 22

Mackay Radio & Telegraph Co. v. Radio Corporation of America, 306 U. S. 86, 89 13

Mazer v. Stein, 347 U. S. 201 .....10, 12, 13, 17, 19

Miffin v. R. H. White Co., 190 U. S. 260 23

Muncie Gear Works, Inc., et al. v. Outboard Marine & Manufacturing Co., et al., 315 U. S. 759, 766 13

New York Times Co. v. Star Co., 195 Fed. 110 17

PAGE

Paramount Publix Corp. v. American Tri-Ergon Corp., 294 U. S. 464 13

Schrieber-Schroth Co. v. Cleveland Trust Co. et al., 305 U. S. 47, 50 13

Wheaton v. Peters, 8 Pet. (U. S.) 591 17

White-Smith Music Publishing Co. v. Appollo Co., 209 U. S. 1 17

Wood v. Abbott, 30 F. Cas. No. 17,948; 5 Blatchf. 325 17

STATUTES AND AUTHORITIES CITED

Amendatory Act of August 24, 1912; 37 U. S. Stat. L. Pt. 1, Chap. 356, p. 488 4

British Act of 1911, Section 35 15

Copyright Law, Section 10 ..... 21, 22

Copyright Act, 35 Stat. L. 1075 16

The Copyright Act of 1870, July 8, 1870, Ch. 230 (16 Stat. L. 212) 4

37 C. F. R., Ch. II, Part 202, Sec. 201.4(b) 7, 16

37 C. F. R., Ch. II, Part 202, Sec. 202.8 ..... 7, 11, 16

H. R. Rep. No. 2222, 60th Cong. 2d Sess. 10 18

PAGE

1957 Cumulative Annual Pocket Part of United States Code Annotated (Title 17, Copyrights) pages 12 to 17 19

U. S. Constitution, Article 1, Section 8 ..... 3, 10, 13

Title 17, United States Code 5

Kupferman and Foner, Universal Copyright Convention Analyzed (1955) pages 173 to 186 .... 19, 20

I Ladas, The International Protection of Literary and Artistic Property (1938) 247 21

II Ladas, The International Protection of Literary and Artistic Property (1938) 718 15

IN THE

Supreme Court of the United States

OCTOBER TERM 1957

No. .....

—o—

DU BOYES, INC., ARKE, INC., CAPRI JEWELRY, INC., JULES STEINBERG, MORRIS KIMMELMAN, HYMAN SLOVITT, ABRAHAM J. SLOVITT and SAMUEL FRIEDMAN, d.b.a. B. STEINBERG-KASLO COMPANY (sued as JULES STEINBERG and I. SLOVITZ, d.b.a. B. STEINBERG-KASLO COMPANY), VOLUPTE, INC., and WALTER HEIMLER, INC.,

Petitioners,

vs.

MARCEL BOUCHER, d.b.a. BOUCHER, and MARCEL BOUCHER and JEANNE BOUCHER d.b.a. MARCEL BOUCHER, ET CIE.,

Respondents.

—o—

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioners, Du Boyes, Inc., Arke, Inc., Capri Jewelry, Inc., Jules Steinberg, Morris Kimmelman, Hyman Slovitt, Abraham J. Slovitt and Samuel Friedman, d.b.a. B. Steinberg-Kaslo Company (sued as Jules Steinberg and I. Slovitz, d.b.a. B. Steinberg-Kaslo Company), Volupte, Inc., and Walter Heimler, Inc., pray that a writ of certiorari

issue to review the judgment of the United States Court of Appeals for the Second Circuit entered on April 7, 1958 in the case there entitled "Marcel Boucher, d.b.a. Boucher, and Marcel Boucher and Jeanne Boucher, d.b.a. Marcel Boucher et Cie., Plaintiffs-Appellees, v. Du Boyes, Inc., Arke, Inc., Capri Jewelry, Inc., Jules Steinberg, Morris Kimmelman, Hyman Slovitt, Abraham J. Slovitt and Samuel Friedman, d.b.a. B. Steinberg-Kaslo Company (sued as Jules Steinberg and I. Slovitz, d.b.a. B. Steinberg-Kaslo Company), Volupte, Inc. and Walter Heimler, Inc., Defendants-Appellants, Docket No. 24,589.

Opinions Below

The findings of fact and conclusions of law and interlocutory and final judgments of the District Court are printed in the certified record and the nine copies of the printed record below filed herewith (R. 152a-171a)*. (The District Court did not deliver a separate opinion.) The opinion and judgment of the Court of Appeals are printed in the Appendix hereto (A. 1a-3a)* and reported in 117 U. S. P. Q. 156, but not yet officially reported.

Jurisdiction

The judgment of the Court of Appeals was entered on April 7, 1958 (A. 4a). No petition for rehearing was filed. The jurisdiction of this Court is invoked under 28 U. S. C. §1254 (1) and under Rule 19, paragraph 1 (b) of the Revised Rules of this Court.

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* Record citations will be in the following form:

(R. 2a)—Page 2a of the certified record and in the printed record below which have corresponding pagination;

(A. 2a)—Page 2a of the Appendix to this petition bound with it.

The Questions Presented

1. Is costume jewelry (earrings, pins, clips, necklaces, bracelets, etc.) "writings" within the meaning of Art. 1, Sec. 8, Cl. 8 of the Constitution of the United States and, if so, is costume jewelry proper subject matter of copyright under the existing Copyright Law of the United States (17 U. S. C.)?

2. Did the Register of Copyrights, with the approval of the Librarian of Congress and without the consent of Congress, have the authority under Section 207 of the Copyright Law to include "works of artistic craftsmanship", and thereby costume jewelry, as copyrightable subject matter, so long as Congress did not include such subject matter in the Copyright Law under Art. 1, Sec. 1, Cl. 1 of the Constitution?

3. When copyright registration is obtained on a single article of costume jewelry, is the statutory requirement of copyright notice under Section 10 of the Copyright Law (17 U. S. C.) which states that "such notice shall be affixed to each copy of the work published or offered for sale in the United States", complied with when the copyright notice is affixed to only one of a set of two of said articles of costume jewelry removably clipped to a card, when such articles, although sold in sets of two, also may be used separately or independently by the consumer?

Constitutional Provision

Article 1, Section 8, United States Constitution:

> The Congress shall have power * * * (Clause 8) to promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries.

Statutes Involved

The Copyright Act of 1870, July 8, 1870, Ch. 230 (16 Stat. L 212), "An Act to revise, consolidate and amend the Statutes relating to Patents and Copyrights."

> Sec. 86. And be it further enacted, that any citizen of the United States, or resident therein, who shall be the author, inventor, designer, or proprietor of any book, map, chart, dramatic or musical composition, engraving, cut, print, or photograph or negative thereof, or of a painting, drawing, chromo, statue, statuary, and of models or designs intended to be perfected as works of the fine arts. * * * shall, upon complying with the provisions of this act, have the sole liberty of printing, reprinting, publishing, completing, copying, executing, finishing and vending the same. * * *

Amendatory Act of August 24, 1912; 37 U. S. Stat. L. Pt. 1. Chap. 356, p. 488

> Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That sections five, * * * of the Act entitled "An Act to amend and consolidate the Acts respecting copyrights," approved March fourth, nineteen hundred and nine, be amended to read as follows:
>
> Sec. 5. That the application for registration shall specify to which of the following classes the work in which copyright is claimed belongs:
>
> (a) Books, * * *
>
> * * *

(l) Motion-pictures, photoplays,*

(m) Motion-pictures other than photoplays:*

* * *

Title 17, United States Code:

§1. *Exclusive rights as to copyrighted works.*

Any person entitled thereto, upon complying with the provisions of this title, shall have the exclusive right:

(a) To print, reprint, publish, copy and vend the copyrighted work; July 30, 1947, C. 391, §1, 61 Stat. 652.

§4. *All writings of author included*

The works for which copyright may be secured under this title shall include all the writngs of an author. July 30, 1947, c. 391, §1, 61 Stat. 652.

§5. *Classification of works for registration.*

The application for registration shall specify to which of the following classes the work in which copyright is claimed belongs:

(a) Books, including composite and cyclopedic works, directories, gazetteers, and other compilations.

(b) Periodicals, including newspapers.

(c) Lectures, sermons, addresses (prepared for oral delivery).

(d) Dramatic or dramatico-musical compositions.

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* Classes added to Sec. 5 of the Act of 1909.

(e) Musical compositions.

(f) Maps.

(g) Works of art; models or designs for works of art.

(h) Reproductions of a work of art.

(i) Drawings or plastic works of a scientific or technical character.

(j) Photographs.

(k) Prints and pictorial illustrations including prints or labels used for articles of merchandise.

(l) Motion-picture photoplays.

(m) Motion-pictures other than photoplays.

The above specifications shall not be held to limit the subject matter of copyright as defined in section 4 of this title, nor shall any error in classification invalidate or impair the copyright protection secured under this title. July 30, 1947, c. 391, §1, 61 Stat. 652.

§10. *Publication of work with notice.*

Any person entitled thereto by this title may secure copyright for his work by publication thereof with the notice of copyright required by this title; and such notice shall be affixed to each copy thereof published or offered for sale in the United States by authority of the copyright proprietor, except in the case of books seeking ad interim protection under section 22 of this title. July 30, 1947, c. 391, §1, 61 Stat. 652.

§207. *Rules for registration of claims*

Subject to the approval of the Librarian of Congress, the Register of Copyrights shall be authorized to make rules and regulations for the registration of claims to copyright as provided by this title. July 30, 1947, c. 391, §1, 61 Stat. 652.

Rules and Regulations of the Copyright Office

37 C. F. R., Ch. II, Part 202 (as of March 1948) Sec. 201.4 (b)

(7) Works of art and models or designs for works of art. This term includes all works belonging fairly to the so-called fine arts. (Paintings, drawings, and sculpture.)

The protection of productions of the industrial arts utilitarian in purpose and character even if artistically made or ornamented depends upon action under the patent law; but registration in the Copyright Office has been made to protect artistic drawings notwithstanding they may afterwards be utilized for articles of manufacture.

Toys, games, dolls, advertising novelties, instruments, or tools of any kind, glassware, embroideries, garments, laces, woven fabrics, or similar articles, are examples. The exclusive right to make and sell such articles should not be sought by copyright registration.

37 C. F. R., Ch. II, Part 202 (effective March 1, 1949) §202.8. Works of art Glass G)—(a) In general.

This class includes works of artistic craftsmanship, in so far as their form but not their mechanical or utilitarian aspects are concerned, such as artistic jewelry, enamels, glassware and tapestries, as well as all works belonging to the fine arts, such as paintings, drawings, and sculpture. * * *

Universal Copyright Convention

The Contracting States,

Moved by the desire to assure in all countries copyright protection of literary, scientific and artistic works,

Convinced that a system of copyright protection appropriate to all nations of the world and expressed in a universal convention, additional to, and without impairing international systems already in force, will ensure respect for the rights of the individual and encourage the development of literature, the sciences, and the arts,

Persuaded that such a universal copyright system will facilitate a wider dissemination of works of the human mind and increase international understanding,

Have agreed as follows:

Article I

Each Contracting State undertakes to provide for the adequate and effective protection of the rights of authors and other copyright proprietors in literary, scientific and artistic works, including writings,

musical, dramatic and cinematographic works, and paintings, engravings and sculpture.

* * * * *

ARTICLE X

1. Each State party to this Convention undertakes to adopt, in accordance with its Constitution, such measures as are necessary to ensure the application of this Convention.

2. It is understood, however, that at the time an instrument of ratification, acceptance or accession is deposited on behalf of any State, such State must be in a position under its domestic law to give effect to the terms of this Convention.

* * * * *

Statement of the Case

Petitioner, B. Steinberg-Kaslo Company manufactures and sells costume jewelry. The other petitioners are jobbers, purchase the costume jewelry from petitioner, B. Steinberg-Kaslo Company and sell the same to dealers. Respondents manufacture and sell costume jewelry. The costume jewelry comprise earrings, pins, clips, necklaces, bracelets, etc.

Respondents obtained copyrights on pieces of costume jewelry and brought the action against petitioners in the United States District Court for the Southern District of New York for copyright infringement and unfair competition and after a trial of the issues, the District Court found for the respondents on the copyright infringement claim but dismissed respondent's claim for unfair com-

petition. The District Court issued and filed its findings of fact and conclusions of law (R. 152a). Interlocutory judgment for infringement was entered (R. 164a) and final judgment for $32,757.22 was entered (R. 168a).

Petitioners appealed from the interlocutory and final judgments, to the Second Circuit Court of Appeals (R. 167a, 172a). On April 7, 1958, the Court of Appeals filed its opinion (A1a-3a) affirming the District Court's judgment and on April 24, 1958 its judgment was filed in the District Court.

With respect to questions 1 and 2, the decisions and judgments of both lower courts resulted from a misinterpretation of this Court's decision in *Mazer* v. *Stein*, 347 U. S. 201, are in conflict with existing statutes and decisions of this Court and disregarded the true intent and purpose of Art. 1, Sec. 8, Cl. 8 of the United States Constitution with respect to questions 1 and 2 and the mandatory requirement of Sec. 10 of the Copyright Law (17 U. S. C.) with respect to question 3.

All of the copyrights in issue, namely eleven, are involved with respect to questions 1 and 2 presented herein. Photoprints of respondents' articles of costume jewelry relating to these copyrights appear on pages R. 82a1 to R. 82a11.

As hereinafter fully set forth, under the constitutional provision, it is Congress, alone, which is given the power to secure for limited times to authors the exclusive right to their respective writings, and, therefore, it is Congress, within the limits of the Constitution, that decides what is to be embraced by the word "writings", which decision cannot be delegated to or usurped by the Librarian of Congress or the Register of Copyrights. There is no authority under the constitution or by act of Congress to include costume jewelry as copyrightable subject matter.

Three of the copyrights in issue are involved with respect to question 3. The articles of costume jewelry manufactured by respondents under these three copyrights comprised 36% of respondents' total quantity in issue (R. ii opposite p. R 1a) and relate to earrings and pins corresponding to the photoprints R. 82a5, R. 82a8 (which has a matching pair of earrings, only one of which had the statutory copyright notice affixed to it) and R. 82a11. These earrings are of the clip type. Thus, these clip earrings although usually sold in pairs removably clipped to a card, because of their easy manner of attachment, that is, by a simple clipping or clamping action, are very frequently used individually or independently by women as ornamental clips on wearing apparel, pocketbooks and purses or as an ornamental fastening means by passing the clip portion through two registering buttonholes of a garment and clamping it against the fabric. Therefore, because of their adaptability and capability of being used as independent items, each must have affixed to it the statutory copyright notice.

The errors of law may be stated in the following words in the decision of the Court of Appeals (A1a-3a) in affirming the lower court:

> The defendants' contentions upon this appeal are addressed to the technical requirements of the provisions of the Act; together with a claim that the items in question, designed and manufactured by the plaintiffs are not copyrightable subject matter and entitled to protection under the Copyright Law. The later claim is untenable. The decision in Mazer v. Stein, 347 U. S. 201, in which the regulation, authorizing the registration of items of artistic jewelry, is cited, is a complete answer to such contention (37 C. F. R., 1949, §202.8).
>
> * * * * *

> Plaintiffs' earrings were sold in sets of two. The copyright notice was stamped upon only one earring of each set and it is therefore contended that such a notice was insufficient under the statute. The argument seems to be based on evidence to the effect that a single earring may be used as a dress ornament or clip and that some of the defendants' earrings were sold singly for that purpose. The contention is rejected. Because earrings might be used singly does not mean that they are separate works of art. The plaintiffs invariably sold them in pairs. Each pair was considered as a unit. (*Patterson* v. *Century Productions*, 2 Cir., 93 F. 2d 489, cert. den. 303 U. S. 665; *Lydiard-Peterson Co.* v. *Woodman*, 204 Fed. 921 * * *

Petitioners respectfully submit that the Court of Appeals was in error in applying *Mazer* v. *Stein*, 347 U. S. 201, to the case at bar; and in ruling that, where the copyright registration was obtained on but a single earring, a copyright notice on only one of a pair of earrings, complied with Section 10 of the Copyright Law (R. 181a, R. 187a, R. 193a).

Reasons for Granting the Writ

1. This is an important matter of national consequence to the costume jewelry industry, a multi-million dollar industry which is widespread in the United States and finds it wares worn by substantially every girl and woman.

2. The Court of Appeals has misconstrued the Copyright Law and the decisions of this Court with respect to copyrights. This Court has not heretofore held that costume jewelry is subject to copyright protection. It did not so hold in *Mazer* v. *Stein*, 347 U. S. 201.

3. Substantially all of the costume jewelry sales are centered in new York City. The courts outside of the Second Circuit are not likely to have cases arising involving this question.

4. This Court has heretofore granted certiorari to review important questions of interpretation of the patent and trademark laws, even where there has been no diversity of opinions between Circuits, when substantially all of the industry involved is in one circuit. *Muncie Gear Works, Inc., et. al.*, v. *Outboard Marine & Manufacturing Co., et al.*, 315 U. S. 759, 766; *Exhibit Supply Co.* v. *Ace Patents Corp.*, 315 U. S. 126, 128; *Mackay Radio & Telegraph Co.* v. *Radio Corporation of America*, 306 U. S. 86, 89; *Schrieber-Schroth Co.* v. *Cleveland Trust Co., et al.*, 305 U. S. 47, 50; *Paramount Publix Corp.* v. *American Tri-Ergon Corp.*, 294 U. S. 464 *

5. The question as to whether works of artistic craftsmanship, and in particular costume jewelry, are "writings" within the meaning of Art. 1, Sec. 8, Cl. 8 of the Constitution has not been heretofore decided by this Court and certainly not by *Mazer* v. *Stein*. In the words of Mr.

---

* In *Muncie Gear Works Inc. et al.* v. *Outboard, Marine & Manufacturing Co. et al.*, the Court considered as a reason for the granting of certiorari to review a decision of a Circuit Court of Appeals sustaining claims of a patent as to which there was no conflict of decision, the fact that the patent dominated a substantial portion of an industry so concentrated in one circuit that a conflict of decision was unlikely, citing *Schreiber-Schroth Co.* v. *Cleveland Trust Co.*, 305 U. S. 47. In the latter case it was held that where it is improbable, notwithstanding the doubtful validity of a patent, that conflict of decision respecting its validity will arise in different circuits, because of the concentration in one circuit of the industry in which the patented devices are used, there is reason for granting certiorari to review a decision in that circuit sustaining it, citing *Paramount Publix Corp.* v. *American Tri-Ergon Corp.*, 294 U. S. 464; *Altoona Publix Theatres* v. *American Tri-Ergon Corp.*, 294 U. S. 477.

Justice Dougles it is time that the Supreme Court "came to the problem full face".

6. In *Mazer* v. *Stein*, Mr. Justice Dougles, in a separate opinion concurred in by Mr. Justice Black, said:

> "An important constitutional question underlies this case—* * *. It is whether these statuettes of dancing figures may be copyrighted. * * *
>
> "* * * Is a sculptor an 'author' and is his statue a writing within the meaning of the Constitution. We have never decided the question.
>
> * * * * *
>
> "*The interests involved in the category of 'works of art', as used in the copyright law, are considerable.* The Copyright Office has supplied us with a long list of such articles which have been copyrighted—statuettes, bookends, clocks, lamps, doorknockers, candlesticks, inkstands, chandeliers, piggy banks, sundials, salt and pepper shakers, fish bowls, casseroles, and ash trays. Perhaps these are all 'writings' in the constitutional sense. But to me, at least, they are not obviously so. *It is time that we came to the problem full face.*" * * *. (Italics supplied.)

7. Under Article X of the Universal Copyright Convention of which the United States is a party, the United States must be in a position under its *domestic law* to give effect to the Convention, including Article I thereof, which requires the contracting State to undertake to provide for the adequate and effective protection of the rights of copyright proprietors in literary, scientific and artistic works. It cannot delegate that power to, nor can it be assumed by the Librarian of Congress.

8. The Court of Appeals was in error in deciding that, because, respondents sold their earrings in pairs, each pair was considered as a unit—a single work of art and that it is sufficient if only one earring of each pair is marked with the copyright notice. This, despite the fact that the earrings may be used separately or independently as dress ornaments (R. 206a).

ARGUMENT

1. With Respect to Questions 1 and 2.

The protection of artistic designs applied to industrial products by the Copyright Law should be clearly legislated for by an appropriate amendment to the Copyright Law and *not* by a rule or regulation of the Copyright Office. (II Ladas, The International Protection of Literary and Artistic Property (1938) 718.) Copyright protection for artistic craftsmanship applied to industrial products is too important a matter to be determined by rules or regulations of the Copyright Office controlled by a single person—the Register of Copyrights—even with the approval of the Librarian.

Section 35 of the British Act of 1911 defines artistic work to include a work of "artistic craftsmanship". Therefore, Congress should define works of art to include artistic craftsmanship and should legislate that works of artistic craftsmanship are copyrightable.

To allow the Register of Copyrights to exercise power to include or exclude artistic craftsmanship in a category or class created by Congress is to give him the power to legislate under the guise of making a regulation.

Even the statement at the end of Section 5 of the Copyright Law that the specifications or classes enumerated

therein (a) to (m) shall not be held to limit the subject matter of copyright, as defined in Section 4 of Title 17, does not give the Register of Copyrights this power to include artistic craftsmanship in 37 C. F. R. §202.8, a material change from 37 C. F. R. §201.4 (b) (7) which was in effect prior to March 1, 1949.

When Congress had enacted the Copyright Law to include "works of art" an expansion of the law to include "works of artistic craftsmanship" (37 C. F. R., Ch. II, Part II, Sec. 202.8), is an act of legislation by the Register of Copyrights, without authority by Congress. Only Congress is given the authority by the Constitution to enact substantive provisions as to copyright legislation. It did not delegate that authority to the Register of Copyrights; the latter assumed an authority which he did not have.

In the earlier rule (37 C. F. R., Ch. II, Part 202, Sec. 201.4 (b) and (7), the Register of Copyrights exercised rule-making power to indicate practice, but there was no attempt to provide a substantive definition of "works of art". That rule continued in effect for more than 25 years. Only then, without act of Congress, did the Register of Copyrights arbitrarily include "works of artistic craftsmanship" within the law of copyright.

From the first enactment in 1790 to the most recent codification in 1947, it was Congress which specified and enumerated the subjects or works which may be protected by copyright.

In 1909, Congress enacted the Copyright Act* defining the clauses of copyright registration (a) to (k). In 1912,

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* 35 Stat. L. 1075. The Act of March 4, 1909, revised, collated, and reorganized the federal copyright laws and this Act became, and still is the basic copyright law. It repealed and superseded prior laws on the subject of copyrights, and established the office of Register of Copyrights under the supervision of the Librarian of Congress.

Congress amended the Act to include two additional classes (l) and (m). Any further amendment to include "works of artistic craftsmanship" should be made by Congress, and not by the Register of Copyrights.

Art. 1, Sec. 8, Cl. 8, of the Constitution of the United States, provides that Congress shall have power to promote the progress of the useful arts by securing for limited times to authors the exclusive right to their respective writings. Thus, copyright is purely a statutory right or grant and enjoys only the right which the statute confers. *Caliga* v. *Inter Ocean Newspaper Co.*, 215 U. S. 182; *Globe Newspaper Co.* v. *Walker*, 210 U. S. 356; *Bobbs-Merill Co.* v. *Strauss*, 210 U. S. 339; *White-Smith Music Publishing Co.* v. *Appollo Co.*, 209 U. S. 1; *Banks* v. *Manchester*, 128 U. S. 244; *Wheaton* v. *Peters*, 8 Pet. (U. S.) 591. Copyrights may be obtained and enjoyed only in respect to the works or subjects specified in the statute (*New York Times Co.* v. *Star Co.*, 195 Fed. 110).

No authority exists for obtaining a copyright beyond the extent to which Congress has authorized it (*Banks* v. *Manchester*, *supra*), and since copyright in published works is purely a statutory creation, a copyright may be obtained only for work falling within the statutory enumeration or description (*Wood* v. *Abbott*, 30 F. Cas. No. 17,948; 5 Blatchf. 325). There is no statute which provides copyright protection for costume jewelry or works of artistic craftsmanship.

Thus, the Court of Appeals in affirming that costume jewelry is copyrightable, is in conflict with the foregoing decisions.

Re: *Mazer* v. *Stein*, 347 U. S. 201.

This case involved the validity of copyrights obtained for statuettes of male and female dancing figures made of

semi-vitreous china. The controversy centered around the fact that although copyrighted as "works of art", the statuettes were intended for use and used as bases for complete table lamps. It involved the registration of statuettes and their later embodiment in industrial articles.

There was only a single question presented to this Court for consideration:

> Can statuettes be protected in the United States by copyright when the copyright applicant intended primarily to use the statuettes in the form of lamp bases to be made and sold in quantity and carried the intentions into effect?

The Court answered this question in the affirmative, holding that the successive Acts, the legislative history of the 1909 Copyright Act, and the practice of the Copyright Office unite to show that "works of art" and "reproductions of works of art" are terms that were intended by Congress to include authority to copyright *statuettes* intended primarily for use in form of lamp bases to be made and sold in quantity.

The 1909 Copyright Act superseded prior laws on the subject of copyright including the Copyright Act of 1870 which specifically included "statue" and "statuary" as works of art which could be copyrighted. (See p. 4, this petition.) The Court in its opinion specifically referred to and quoted from the 1870 Act, and referring to the 1909 Act which provided that the works for which copyright may be secured under this Act shall include all the writings of an author, said that the House Report (H. R. Rep. No. 2222, 60th Cong., 2d Sess. 10), "while inconclusive, indicates that it was 'declaratory of existing law' only."

This Court in reviewing the practice of the Copyright Office and the pertinent Copyright Regulations published by it under the 1870, 1874 and 1909 Acts, said:

> "So we have a contemporaneous and long-continued construction of the statutes by the agency charged to administer them that would allow the registration of such a *statuette* as is in question here." (Italics supplied.)

The Court is respectfully referred to Mr. Justice Douglas' statements in petitioners' sixth reason for the granting of the writ. The interests involved in the category of "works of art" as used in the copyright law, in general, and with relation to the inclusion therein of costume jewelry, in particular, are considerable and it is respectfully submitted that this problem should be met "full-face" by this honorable court.

The problem raised by Mr. Justice Douglas in *Mazer* v. *Stein* should be met "full face" more so now in view of the fact that the United States has become a party to the Universal Copyright Convention, after *Mazer* v. *Stein* was decided by this Court.

The Unesco Universal Copyright Convention was adopted by the Intergovernmental Copyright Conference at Geneva, Switzerland, on September 6, 1952. It entered into force for the United States on September 16, 1955. The text of the Convention is set out in full in the footnote (under §9) of the 1957 Cumulative Annual Pocket Part of United States Code Annotated (Title 17, Copyrights) pages 12 to 17, inclusive and in Kupferman and Foner, Universal Copyright Convention Analyzed (1955) pages 173 to 186, inclusive.

The preamble and Articles I and X are printed herein (pp. 8-9). The provisions of Article I of the Convention are

general. There is no definitive enumeration of works or rights to be protected. As the Convention is not self-executing, it expressly requires each State to "adopt, in accordance with its Constitution, such measures as are necessary", and that "each state must be in a position under its domestic law to give effect to the Convention".

> Unlike Berne and the divers Pan-American conventions, which define the works and rights protected, this Convention, being an international statute, left it to each state to specify the works which are to be embraced within the general categories of literary, scientific and artistic works, as defined in Article I. Under the Convention, therefore, each state may decide whether oral or architectural works, engravings, natural art, technical drawings, works of applied art or other works are within the classifications stated in Article I. Some states grant protection under their domestic law to one class of works, while others are prohibited from doing so. Some states protect works of applied art, while others do not give protection to architectural or other useful works. Some states may determine whether all public performances may be protected, while others may limit protection to public performances for profit, and still others may impose compulsory licenses or exempt certain uses of the work from protection. While copyrightability, thus, may vary from country to country, a single *standard* of protection is established.*

Therefore, it is the province of Congress and it alone, to specify or define works of applied art or artistic craftsmanship with relation to copyright protection—to give effect to the Universal Copyright Convention.

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* Universal Copyright Convention Analyzed, *supra*, pp. 18-19.

Even under the Berne Convention (United States was not a party) works of art applied to industry are protected only so far as the *domestic legislation* of each country allows. (I Ladas, The International Protection of Literary and Artistic Property [1938] 247.)

To specify or define works of applied art or artistic craftsmanship is too important an undertaking to be left in the hands of a single person, the Librarian of Congress, under his power to make rules and regulations. For a Librarian of Congress who may supplant him may very well and at will amend or repeal the very rule or regulation which he had made.

2. With Respect to Question 3.

The Court of Appeals was in error in deciding that, because respondents sold their earrings in pairs, each pair was considered as a unit—a single work of art and that it is sufficient if only one earring of each pair is marked with the copyright notice. This, despite the fact that the earrings may be used separately or independently as dress ornaments (R. 206a).

It is clear that the copyright registrations were obtained for a *single earring* (R. 181a, 193a) and for a *single pin* (R. 187a). The title of the work in each of the said certificates of copyright registrations does not make reference to copyright protection for a *pair* of earrings but to an earring. Furthermore, on the second page of the certificate (R. 182a, 188a, 194a) in paragraph 10 (a) "Wording of copyright notice appearing on work" respondent stated "© Boucher" and next to "Location of notice", respondent stated "Stamped on back of earring", which could only mean each earring. Therefore, each earring must be considered as a copy of the copyrighted work and in accordance with Section 10 of the Copyright Law the notice

must be affixed to "*each copy*" of the work "published or offered for sale". The same reasoning is applicable to where respondents copyrighted only the pin and under this copyright published and sold a matching pair of earrings removably mounted on a card, only one of the earrings being stamped with the copyright notice. The pair of earrings was not copyrighted. What this amounts to is that with respect to the earrings, only fifty percent of the copies were stamped or marked with the copyright notice.

In enacting the copyright statute Congress created a new right dependent on compliance with the statute. *Caliga* v. *Inter Ocean Newspaper Company, supra.*

The courts cannot lower the requirement as to copyright notice no more than the courts can enlarge the remedy. In *Globe Newspaper Company* v. *Walker, supra,* it was held that Congress alone has power so to do by amending the statute.

Section 10 (publication with copyright notice) of the Copyright Law is one of the sections that deals with the conditions of acquiring statutory copyright. This must be complied with as a condition precedent to the vesting of the statutory copyright. Section 1 of the Copyright Law, which defines the rights included in copyright, provides explicitly that these are conferred upon any person entitled thereto "upon complying with the provisions of this title". Under the Copyright Law publication initiates statutory copyright *provided* each copy of the work (each earring) when published bears the notice of copyright required by the Act. The object of the notice of copyright is to notify the public of the claim of copyright and this object is not fulfilled when fifty percent of the earrings do not bear this notice.

When two copies or reproductions of a work are published on one sheet or card, a notice *must* appear for each

of the copies or reproductions. *De Jonge & Co.* v. *Breuker & Kessler Co.* (1910) 182 Fed. 15 affirmed (1914) 235 U. S. 33, 36; 35 S. Ct. 6, 59 L. ed. 113.

Every reproduction of a copyrighted work must bear the statutory notice. *American Tobacco Co.* v. *Werckmeister* (1907) 207 U. S. 284, 28 S. Ct. 72, 52 L. ed. 208. *Deward & Rich*, v. *Bristol Savings & Loan Corporation*, C. C. A. Va. 1941, 120 F. 2d 537.

This Court said in *Miffin* v. *R. H. White Co.*, 190 U. S. 260,

> It is incorrect to say that any form of notice is good which calls attention to the person of whom inquiry can be made and information obtained since the right being purely statutory, the public may justly demand that the person claiming a monopoly shall pursue, in substance at least, the statutory method of securing it.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

MAXWELL E. SPARROW,
Attorney for Petitioners.

J. PRESTON SWECKER,
of Counsel.

May 20, 1958

APPENDIX

Decision

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 246—October Term, 1957.

(Argued March 13, 1958 Decided April 7, 1958.)

Docket No. 24582

MARCEL BOUCHER d/b/a BOUCHER, and MARCEL BOUCHER and JEANNE BOUCHER d/b/a MARCEL BOUCHER ET CIE.,

Plaintiffs-Appellees,

—against—

DU BOYES, INC., ARKE, INC., CAPRI JEWELRY INC., JULES STEINBERG, MORRIS KIMMELMAN, HYMAN SLOVITT, ABRAHAM J. SLOVITT and SAMUEL FRIEDMAN d/b/a B. STEINBERG-KASLO COMPANY (sued as JULES STEINBERG and I. SLOVITZ d/b/a B. STEINBERG-KASLO COMPANY), VOLUPTE, INC., and WALTER HEIMLER, INC.,

Defendants-Appellants.

Before:

CLARK, *Chief Judge,*

HINCKS, *Circuit Judge,* and BRENNAN, *District Judge.*

Appeal from a judgment of the United States District Court for the Southern District of New York, Sylvester J. Ryan, *Judge,* awarding injunctive relief and damages in an action for copyright infringement. Affirmed.

—o—

FORSYTHE, MCGOVERN & FETZER, New York, N. Y. (Thomas A. McGovern, Burton L. Knapp, of counsel), *for plaintiffs-appellees.*

MAXWELL E. SPARROW, New York, N. Y., *for defendants-appellants.*

—o—

PER CURIAM:

It is not seriously disputed but that defendants manufactured and sold carbon copies of certain items of costume jewelry which had been registered in accordance with the Copyright Act as works of art.

The defendants' contentions upon this appeal are addressed to the technical requirements of the provisions of the Act, together with a claim that the items in question, designed and manufactured by the plaintiffs are not copyrightable subject matter and entitled to protection under the Copyright Law. The later claim is untenable. The decision in *Mazer* v. *Stein*, 347 U. S. 201, in which the regulation, authorizing the registration of items of artistic jewelry, is cited, is a complete answer to such contention (37 C. F. R. 1949, §202.8).

The trial court found that the defendants deliberately copied plaintiffs' copyrighted articles of costume jewelry; that said items were artistic in nature and were marked in compliance with the statute. The evidence adequately supports the findings and it is necessary only to comment upon one additional contention made by the defendants.

Plaintiffs' earrings were sold in sets of two. The copyright notice was stamped upon only one earring of each set and it is therefore contended that such a notice was

insufficient under the statute. The argument seems to be based on evidence to the effect that a single earring may be used as a dress ornament or clip and that some of the defendants' earrings were sold singly for that purpose. The contention is rejected. Because earrings might be used singly does not mean that they are separate works of art. The plaintiffs invariably sold them in pairs. Each pair was considered as a unit. (*Patterson* v. *Century Productions*, 2 Cir., 93 F. 2d 489, cert. den. 303 U. S. 655; *Lydiard-Peterson Co.* v. *Woodman*, 204 Fed. 921.) A somewhat simlar argument, addressed to plaintiffs' necklaces, is invalid since each carried a copyright notice on one of the integral parts.

Plaintiffs request an allowance of additional attorneys' fees for this appeal. In view of the deliberate nature of the infringement and the lack of substance to the defendants' contention on this appeal, the request has received consideration. An allowance for attorneys' fees has already been made below. Under the circumstances, an additional allowance of Five Hundred Dollars is made to the plaintiffs for the services of counsel on this appeal.

Affirmed.

Judgment

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the 7th day of April one thousand nine hundred and fifty-eight.

Present: HON. CHARLES E. CLARK,
Chief Judge

HON. CARROLL C. HINKS,
Circuit Judge

HON. STEPHEN W. BRENNAN,
District Judge.

MARCEL BOUCHER d/b/a BOUCHER, and MARCEL BOUCHER and JEANNE BOUCHER d/b/a MARCEL BOUCHER, ET CIE,
Plaintiffs-Appellees,

v.

DU BOYES, INC., ARKE, INC., CAPRI JEWELRY, INC., JULES STEINBERG, MORRIS KIMMELMAN, HYMAN SLOVITT, ABRAHAM J. SLOVITT & SAMUEL FRIEDMAN, et. al.,
Defendants-Appellants.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed; with costs to the appellees.

Further ordered that an additional allowance of $500.00 be and it hereby is granted to the appellees for the services of counsel on this appeal.

A. Daniel Fusaro
Clerk

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IN THE

Supreme Court of the United States

October Term, 1957

No. 1017

DE BOYES, INC., ARKE, INC., CAPRI JEWELRY, INC., JULES STEINBERG, MORRIS KIMMELMAN, HYMAN SLOVITT, ABRAHAM J. SLOVITT and SAMUEL FRIEDMAN d/b/a I. STEINBERG-KASLO COMPANY (sued as JULES STEINBERG and I. SLOVITT d/b/a B. STEINBERG KASLO COMPANY), VOLUPTE, INC., and WALTER HEIMLER, INC.,

Petitioners,

—v.—

MARCEL BOUCHER d/b/a BOUCHER, and MARCEL BOUCHER and JEANNE BOUCHER d/b/a MARCEL BOUCHER ET CIE.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION FOR THE RESPONDENTS

THOMAS A. MCGOVERN
BURTON L. KNAPP
Attorneys for Respondents
CHANIN BUILDING
NEW YORK 17, NEW YORK

PAGE

Burrow-Giles Lithographic Co. v. Sarony, 111 U. S. 53 (1883) 17

Chicago & G. T. R. Co. v. Wellman, 143 U. S. 339 (1892) 11

Fielding v. Hawley, 1883, 48 L. T. 639, 47 J. P. 582 7

Hoague-Sprague Corp. v. Frank C. Meyer Co., E. D. N. Y. 1929, 31 F. 2d 583 7

Hollywood Jewelry Mfg. Co., Inc. v. Dushkin, S. D. N. Y. 1955, 136 F. Supp. 738 24

Jungersen v. Baden, S. D. N. Y. 1947, 69 F. Supp. 922, affd. 2 Cir. 1948, 166 F. 2d 807, affd. 335 U. S. 560 23

Keokuk and Hamilton Bridge Co. v. Illinois, 175 U. S. 626 (1900) 11

Lydiard-Peterson Co. v. Woodman, 8 Cir. 1913, 204 Fed. 921 7

Mazer v. Stein, 347 U. S. 201 (1954) ...6, 7, 8, 11, 12, 14, 20

Patterson v. Century Productions, 2 Cir. 1937, 93 F. 2d 489, cert. den. 303 U. S. 655 7

Rescue Army v. Municipal Court of Los Angeles, 331 U. S. 549 (1947) 11

Trifari, Krussman & Fishel, Inc. v. Charel Co., S. D. N. Y. 1955, 134 F. Supp. 551 23

Trifari, Krussman & Fishel, Inc. v. B. Steinberg-Kaslo, S. D. N. Y. 1956, 144 F. Supp. 577 24

Yakus v. U. S., 321 U. S. 414 (1944) 11

PAGE

Statutes

Constitution of the United States,
Article 1, Section 8, Clause 8 .....2, 5, 6, 14, 15, 18

Copyright Laws:
Act of May 31, 1790, c. 15, 1 Stat. 124 16
Act of April 29, 1802, c. 36, 2 Stat. 171 16
Act of February 3, 1831, c. 16, 4 Stat. 436 17
Act of August 18, 1856, c. 169, 11 Stat. 138 17
Act of March 3, 1865, c. 123, 13 Stat. 540 17
Act of July 8, 1870, c. 230, 16 Stat. 198 ..... 17, 22
Act of March 4, 1909, c. 230, 35 Stat. 1075..17, 21, 22, 23
Act of August 24, 1912, c. 356, 37 Stat. 488 17
Act of July 30, 1947, c. 391, 61 Stat. 652, codifying and enacting into positive law Title 17 of of the United States Code, 17 U.S.C., Supp. V., 1, et seq.
17 U.S.C. 5 ..... 3, 9
17 U.S.C. 9 22

Miscellaneous

Regulations of the Copyright Office:
Sec. 202.8 (37 C.F.R. 1949 ed. 202.8) ..9, 10, 18, 20, 21
Sec. 202.10 (37 C.F.R. 1957 ed. 202.10) 8

H.R. Rep. No. 2222, 60th Cong. 2d Sess. 10, 1909 ... 17

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Fenning, The Origin of the Patent and Copyright Clause of the Constitution, 17 Geo. L. J. 109 (1929) 15

Rogers and Beard, 5000 Years of Gems and Jewelry, Frederick A. Stokes Co. (1940) p. 96 23

IN THE

Supreme Court of the United States

October Term, 1957

No. 1017

DU BOYES, INC., ARKE, INC., CAPRI JEWELRY, INC., JULES STEINBERG, MORRIS KIMMELMAN, HYMAN SLOVITT, ABRAHAM J. SLOVITT and SAMUEL FRIEDMAN d/b/a B. STEINBERG-KASLO COMPANY (sued as JULES STEINBERG and I. SLOVITZ d/b/a B. STEINBERG-KASLO COMPANY), VOLUPTE, INC., and WALTER HEIMLER, INC.,

Petitioners,

—v.—

MARCEL BOUCHER d/b/a BOUCHER, and MARCEL BOUCHER and JEANNE BOUCHER d/b/a MARCEL BOUCHER ET CIE.,

Respondents.

BRIEF IN OPPOSITION FOR THE RESPONDENTS

Opinions Below

The findings of fact and conclusions of law and interlocutory and final judgments of the District Court (D. 152a-171a)[1] are not officially reported. The opinion of the United States Court of Appeals for the Second Circuit is reported at 253 F. 2d 948.

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[1] References in this form are to the printed appendices in the Court of Appeals: petitioners' appendix is indicated by D and respondents' appendix is indicated by P.

Jurisdiction

The judgment of the United States Court of Appeals for the Second Circuit which the petition seeks to have reviewed, was dated and entered April 7, 1958. The jurisdiction of this Court is invoked by petitioners under 28 U. S. C. Section 1254(1).

The Questions Presented

After three years of litigation petitioners belatedly seek to formulate for review a question as to whether artistic jewelry is "writings" within the purview of Art. 1, Sec. 8, Cl. 8 of the Constitution of the United States.

The record discloses that this question was not raised by petitioners either in their pleadings, or in the trial before the District Court. It was not raised in the briefs or arguments before the Court of Appeals. Neither of the decisions below, on their face or implicitly, gives the slightest indication that the respective Courts deemed themselves to be considering or deciding a constitutional question. Even now, the few vague and conclusory references in the petition do not seriously present a constitutional question.

The petition on its face discloses that petitioners are attempting at this juncture to repeat and re-argue in this Court, under the guise of a constitutional question, other contentions which have been expressly rejected by two Courts below, and which have been characterized appropriately by the Court of Appeals as "lacking substance." Respondents submit that the record presents only these narrow questions:

1. Whether it appears on the record before this Court that a constitutional question constituting an appropriate ground for review was presented in and expressly or necessarily decided by the Court of Appeals?

2. Whether the term "works of art" in Section 5 of the Copyright Act (Title 17 U. S. C. §5) includes the authority to copyright the jewelry designed and manufactured by respondents?

3. Whether one copyright notice on respondents' pair of earrings constitutes sufficient notice of copyright where such earrings were invariably designed, manufactured and sold and purchased as a unit?

Statement

Respondent, Marcel Boucher, the owner of the copyrights in suit, has been a designer of jewelry for 45 years (P. 2a). After studying applied design, modelling and sculpture in France, he served as an apprentice to some of the leading jewelers in Paris, and subsequently executed assignments of importance, including the design of jewelry for European royalty (P. 2a). Respondent, Marcel Boucher et Cie., is the licensee of the Boucher works, and numbers among its customers the leading retail stores in the country.

The pieces in suit were personally conceived by respondent, Boucher. Typically, he would commence his artistic conception by making a series of rough pencil sketches, and finally full color sketches until the desired artistic effect was obtained. The resulting designs were then laboriously worked and reworked in the form of handmade metal models until the pieces captured the artistic effect originally sought in the drawings (P. 3a-4a). From the

handmade models, rubber molds for casting production copies were made.

A number of original pins, necklaces and pairs of earrings created by this art technique were introduced to the public by respondents in 1954 and 1955. Petitioner, B. Steinberg-Kaslo Company, is a manufacturer, and the five corporate petitioners are jobbers, of costume jewelry. After gauging the wide public acceptance of the original Boucher works, B. Steinberg-Kaslo purchased the 25 most popular Boucher works in retail stores, put them in rubber molds to make copies, and sold the copies to the corporate defendants and to other jobbers throughout the country (P. 11a-15a). In 1955 over 300,000 "carbon copies" of the 25 original Boucher works were placed on the market by petitioners (P. 29a). This action was instituted by respondents on July 7, 1955.

Petitioners have never seriously denied their acts of deliberate piracy, or the fact that the Boucher pieces in suit were both original and artistic (D. 159a). In an attempt to avoid the consequences of their infringement, petitioners interposed no less than 14 affirmative defenses (D. 83a-150a) raising almost every conceivable question in respect of respondents' compliance with the technical requirements of copyright. The District Court rejected these defenses, and in its interlocutory judgment, dated January 7, 1957, granted a permanent injunction and directed an accounting with respect to damages and profits. After protracted hearings before the special master, the District Court confirmed the report of the special master and on October 1, 1957, awarded final judgment to respondents in the sum of $32,757.22, including an attorney's fee of $10,000 (D. 168a).

In its *per curiam* opinion, dated April 7, 1958, the Court of Appeals affirmed in all respects the judgment of the District Court, stating in part:

> "It is not seriously disputed but that defendants manufactured and sold carbon copies of certain items of costume jewelry which had been registered in accordance with the Copyright Act as works of art.
>
> * * * * *
>
> "The trial court found that defendants deliberately copied plaintiffs' copyrighted articles of costume jewelry; that said items were artistic in nature and were marked in compliance with the statute. The evidence adequately supports the findings * * *.
>
> "Plaintiffs request an allowance of additional attorneys' fees for this appeal. In view of the deliberate nature of the infringement and the lack of substance to the defendants' contention on this appeal, the request has received consideration. * * * "

Reasons for Denying Certiorari

(1) Petitioners' failure to present a constitutional question which was expressly or necessarily decided by the Court of Appeals precludes the presentation of such question for review by this Court.

Even now, petitioners furnish no reasons and cite no decisions of this or any other Court expressly or impliedly disputing the authority of Congress to include artistic jewelry as copyrightable subject matter within the meaning of Art. I, Sec. 8, Cl. 8 of the Constitution. Certiorari should not be granted at the instance of parties who do not, or

cannot, furnish authority to substantiate their naked formulation of questions.[1]

(2) Petitioners concede that there is no conflict between the Circuits on the same matter. Petitioners venture to assert, however, that conflict is "not likely" to arise outside the Second Circuit, because "substantially all of the costume jewelry sales are centered in New York City." (Pet. p. 13.) There is no authority in the record or otherwise to support petitioners' *a priori* suggestion that piracy of artistic jewelry designs is endemic to only one judicial circuit. Be that as it may, the possibility of a conflict in future artistic jewelry cases is remote, not for the reason assigned by petitioners, but rather because of the binding precedent established by this Court squarely sustaining the regulation of the Copyright Office covering artistic jewelry,[2] as well as the unfettered sweep of the decisions of the lower courts to date sustaining copyrights on artistic jewelry. In the light of the unqualified judicial approval of artistic jewelry copyrights, petitioners' advocacy of a return to free-booting in this field would have confusing and disastrous consequences.

(3) Equally untenable as a reason for granting certiorari is the alleged error of the Court of Appeals in upholding the validity of a copyright notice on one of a pair of

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[1] Respondents submit that the Boucher jewelry in suit comes squarely within the meaning and intendment of Art. 1, Sec. 8, Cl. 8, and that if that question had been raised below, the authorities would have compelled such conclusion by the Court of Appeals. Although neither the petition nor the record calls for any discussion of the alleged constitutional question on the part of the respondents, in the interests of completeness respondents have collected the pertinent authorities at pages 12 to 20 herein.

[2] *Mazer* v. *Stein*, 347 U. S. 201, at 214.

earrings. Once more, petitioners fail to cite any authority claimed to be in conflict with the decisions cited in the opinion below. There is no need to belabor petitioners' suggestion that beneath the anatomical fact that women possess two ears lurks an important question of federal law. Rather than being a question of public importance, just like petitioners' other hypertechnical questions which have been held below to "lack substance," the question of notice on pairs of earrings merely involves the private interests of a handful of design pirates seeking to find refuge in every conceivable argument which will permit them to capitalize on the artistic labors of others.[1]

(4) Petitioners do not contend that the decision below sustaining the copyrights in suit was "in conflict" with the recent decision of this Court in *Mazer* v. *Stein*, 347 U. S. 201. Without citing any other decision of this Court which they deem to be "applicable," petitioners argue with complete insouciance that the Court of Appeals erred "in applying *Mazer* v. *Stein*, 347 U. S. 201, to the case at

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[1] All of the decisions involving physically separate but interdependent articles hold that a copyright notice on one is sufficient. In *Patterson* v. *Century Products*, 2 Cir. 1937, 93 F. 2d 489, cert. den. 303 U. S. 655, relied upon by the Court of Appeals below, the Court sustained a copyright on a jungle film divided into reels, where the copyright notice was on only the first reel, and each reel showed the interdependence of all. *Lydiard-Peterson Co.* v. *Woodman*, 8 Cir. 1913, 204 Fed. 921, also cited by the Court below, involved a copyright on a directory with a separate map contained in a pocket of the book. The copyright notice was only on the book. The infringer copied only the map, and it was held that notice on the book was sufficient to protect the map. See also *Hoague-Sprague Corporation* v. *Frank C. Meyer Co.*, E. D. N. Y. 1929, 31 F. 2d 583; *Fielding* v. *Hawley* (1883), 48 L. T. 639, 47 J. P. 582. The findings below show that each pair of plaintiffs' earrings was designed, manufactured, sold and copyrighted as a unit (D. 10a, 13a). When petitioners purchased the Boucher works in retail stores, they recognized, copied and sold them to the public for what they were—pairs of earrings (D. 15a).

bar" (Pet. p. 12). In view of the decision in *Mazer* v. *Stein* upholding the validity of the very regulation involved herein, and in the absence of any demonstrated conflict with any other decision of this Court, the petition is frivolous insofar as it seeks certiorari on the ground that the Court of Appeals misconstrued "the decisions of this Court with respect to copyrights" (Pet. p. 12).[1]

ARGUMENT

I.

Petitioner did not present a constitutional question below.

The question which petitioners now seek to formulate as to whether artistic jewelry is "writings" under the Constitution, has never been and is not now seriously tendered in this case. No amount of semantic legerdemain on the part of petitioners can transform the record now before this Court into something different from the record on which the case was tried, appealed, briefed, and argued below.

The only contention pressed with solemnity by petitioners in the Court below related to the alleged invalidity of the Boucher copyrights on three pairs of earrings with the statutory copyright notice affixed to one of each pair of earrings, which were designed, manufactured, sold, reg-

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[1] The 1957 Regulations of the Copyright Office (37 C. F. R. 1957 §202.10), which conform squarely with the criteria of copyrightability established in the *Mazer* case, also enumerate "artistic jewelry" as the first example of works of art eligible for registration.

istered *and copied* as pairs.[1] Other than this alleged question of notice (which even petitioners do not seriously urge warrants review by this Court on certiorari), petitioners raised below only one other question which they now seek to have reviewed.

That question (set forth as Question 2 in the petition) concerned the authority of the Register of Copyrights to promulgate the Regulation (37 C. F. R. 1949, §202.8; Pet. p. 8) which includes "artistic jewelry" as one of the "works of art" eligible for copyright under Section 5 of the Copyright Act (Title 17 U. S. C. §5). The Court of Appeals made short shrift of petitioners' attempt to ignore the applicable principles established by this Court, and stated (Pet. App. 2a):

> "The decision in *Mazer* v. *Stein*, 347 U. S. 201, in which the regulation, authorizing the registration of items of artistic jewelry, is cited, is a complete answer to such contention."

Not once in their pleadings, briefs, arguments, or otherwise, in the Courts below did petitioners even hint at a constitutional limitation on the authority of Congress to include artistic jewelry as copyrightable subject matter. Petitioners' entire argument below was confined solely to the authority of the Register of Copyrights to include artistic jewelry as copyrightable subject matter without specific authority from Congress. On the very eve of trial,

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[1] Petitioners' concentration in the lower courts on the question of the sufficiency of notice on the Boucher earrings was prompted by the fact that defendants' infringing earrings accounted for approximately 50% of their profits on all of the infringements. A holding of invalidity on the copyrights protecting the pairs of earrings would have reduced respondents' recovery of damages and profits proportionately.

on October 16, 1956, petitioners amended their answer to the complaint by interposing a twelfth, thirteenth and fourteenth defense, and still did not raise a constitutional question (D. 148a-150a).

Oddly enough, in their one fleeting reference to the Constitution in the proceedings below, petitioners actually conceded the power of Congress to include artistic jewelry as copyrightable subject matter, where they stated (at pages 20-22), after quoting the copyright clause:

> "It is not contended that the copyright clause of the Constitution was intended to protect only literal 'writings' * * * but it is contended that from the first enactment in 1790 to the most recent codification in 1947, *it was the Congress which determined the scope of copyright. What has been construed as copyright within the definition of 'writings' was decided by Congress* and not by any arbitrary rule or regulation of the Copyright Office. * * * The elimination of the word 'fine' from the 1909 and 1947 Acts does not authorize the Copyright Office to include therein articles of costume jewelry, which comes within the province of design patents. *Such inclusion in the copyright law should be only by Act of the Congress in accordance with its past performances* * * *. (Emphasis supplied.)

As indicated by the foregoing, the inquiry addressed by petitioners to the Court below was not whether the Boucher works were "writings," but, rather, whether they were "works of art." Granting, as petitioners did, the power of Congress to extend copyright protection to "works of art," the only conceivable question tendered to the Courts below was whether Section 202.8 of the then regulations of the Copyright Office properly limned the statutory

phrase, "works of art." The Court of Appeals held that *Mazer* v. *Stein* was "a complete answer to such contention."

This Court long ago stated, and has restated time and time again, its most fundamental rule of procedure that the Court will not decide constitutional questions if they are not raised in the Court below, or if raised below, not presented in the "clean cut," "concrete" and "unclouded" form demanded for the decision of constitutional issues. *Rescue Army* v. *Municipal Court of Los Angeles*, 331 U. S. 549, 584.

See also:

Keokuk and Hamilton Bridge Co. v. *Illinois*, 175 U. S. 626, 633;

Chicago & G. T. R. Co. v. *Wellman*, 143 U. S. 339, 345;

Aircraft & Diesel Equipment Corp. v. *Hirsch*, 331 U. S. 752.

Even in criminal cases, where vital questions of constitutional rights often come into play for the first time at high appellate levels, this Court has adhered to the rule that constitutional questions not raised in the record below will not be considered. *Yakus* v. *U. S.*, 321 U. S. 414, 444. Certainly, departure from this fundamental, traditional rule should not be undertaken in a purely private controversy, and at the instance of deliberate design pirates seeking to delay the day of judgment by last-minute constitutional "afterthoughts."

The instant petition is barren of any reasons for justifying departure from the salutary and long-standing procedure of this Court.

Petitioners assert in a most generalized and vague manner at page 10 of the petition: "There is no authority under the constitution or by act of Congress to include costume jewelry as copyrightable subject matter."

Petitioners do not even make a token effort to support their newly discovered constitutional question by argument or by citation of authority. One searches the petition in vain for even skeletal development of the suggestion that the Boucher jewelry in suit is not "writings" in the constitutional sense. Manifestly, the puzzling "see-where-this-may lead-us" argument devised by petitioners in dragging in the Universal Copyright Convention for the first time, hardly advances the inquiry. Petitioners' resort to this device and their failure to furnish guidance to the Court on the question they profess to be worthy of review on certiorari, confirms their own misgivings as to the merits thereof.

II.

The jewelry in suit is a proper subject of copyright within the meaning of Article I, Section 8, Clause 8 of the Constitution.

Reaching for a *tabula in naufragio*, petitioners ignore the findings of fact below and have grasped at the separate opinion of Mr. Justice Douglas (in which Mr. Justice Black concurred) in *Mazer* v. *Stein, supra.*[1] In his sepa-

[1] In his opinion Mr. Justice Douglas stated that much research was needed on the question he raised. Thereafter, at the suggestion of the Copyright Office, Professor Walter Derenberg and seven associates at the New York University School of Law prepared an extensive study on the subject, presented in "The Meaning of 'Writings' in the Copyright Clause of the Constitution," 31 N. Y. U. L. R., pp. 1263-1312 (Nov. 1956).

rate opinion, Mr. Justice Douglas lists miscellaneous examples of copyrighted articles—from "statuettes, bookends, clocks" to "salt and pepper shakers, fish bowls, casseroles, and ash trays." Yet, it is respectfully submitted, the question of artistic claim to copyright cannot be determined in the abstract, but only in relation to a specific work. The salt shaker on the restaurant table may be a mere piece of tableware, yet no one would deny Cellini's saltcellar as a great work of art.

It is to be remembered that the basic purpose of the constitutional provision as well as the expressed power itself is "To promote the Progress of Science and useful Arts." If the term "writings", which follows this broad grant of power in Clause 8, is to be interpreted as confining the rights to literary authors, then both the purpose and the power itself will be defeated.

The pieces in suit were created by an internationally known designer of artistic jewelry, who designs both costume jewelry and precious jewelry, the only difference between the two being that costume jewelry uses base metals and artificial stones.

The District Court's decision was based on findings of fact supported by substantial evidence that the jewelry pieces were artistic productions and works of artistic craftsmanship conceived as original with Marcel Boucher, and properly entitled to the protection of the Copyright Act (D. 155a). The Court of Appeals specifically confirmed findings of fact that the Boucher works were 'artistic in nature." It is submitted that even if the standards of works of the "fine arts"—as distinguished from the broader category "works of art" in the present statute—

were applied to the pieces in suit, they would qualify as such by reason of Marcel Boucher's originality, the art techniques used, and the uncontroverted expert testimony.

It is respectfully submitted that if this Court denies the constitutional basis of protection for works of art such as the jewelry pieces in suit, because of a restrictive condition of literal "writings," then there can be no justification for the extension of copyright over the past one hundred and fifty years to prints, maps, paintings, sculptures, music, photographs, motion pictures, or any visible expressions of the intellect other than the limited category of books, pamphlets and manuscripts. Such an interpretation of Art. I, Sec. 8, Cl. 8 would come dangerously close to stultifying the artistic and cultural advances in this country which Congress has sought to encourage in its exercise of the power. There is no public policy or social interest to be served by circumscribing the rights of the artist to be protected against plain and deliberate piracy.[1]

Neither the language of Art. I, Sec. 8, Cl. 8, nor the contemporary sources, nor the historical interpretation in Congress and in the courts, affords a sound basis for denying copyright to jewelry, one of mankind's great traditional arts.

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[1] Speaking for this Court in *Mazer* v. *Stein, supra,* Mr. Justice Reed concluded his opinion by stating:

> "The economic philosophy behind the clause empowering Congress to grant patents and copyrights is the conviction that encouragement of individual effort by personal gain is the best way to advance public welfare through the talents of authors and inventors in 'Science and useful Arts.' Sacrificial days devoted to such creative activities deserve rewards commensurate with the services rendered."

(A) The Constitutional Basis

The language of Art. I, Sec. 8, Cl. 8 shows no intention by the framers of the Constitution to limit copyright to "writings" in a restricted sense of that word. The context is a grant of power to promote the progress of "Science and useful Arts" to be exercised in favor of "Authors." Science in its contemporary meaning embraced all knowledge, the arts were at least as broad as science, and an author was the originator of things.[1]

In the development of the clause in the Constitutional Convention the choice of the term "author" appears to have had more significance than the word "writings".[2] The latter term was introduced into the final draft by the drafting committee and adopted without debate.[3] It is, moreover, significant that in the *Federalist*, where Madison felt it necessary to discuss in detail the constitutional limi-

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[1] For contemporary meanings in the ordinary sense, see Samuel Johnson, A Dictionary of the English Language (1775 ed.):

"Science" is given five meanings: 1. Knowledge. 2. Certainty grounded on demonstration. 3. Art attained by precepts, or built on principles. 4. Any art or species of knowledge. 5. One of the seven liberal arts, grammar, rhetoric, logic, arithmetic, music, geometry, astronomy.

"Art" is defined to mean: 1. The power of doing something not taught by nature and instinct. 2. A science. 3. A trade. 4. Artfulness; skill, dexterity. 5. Cunning. 6. Speculation.

"Author" has four meanings: 1. The first beginner or mover of any thing; he to whom anything owes its origin. 2. The efficient; he that effects or produces any thing. 3. The first writer of any thing; distinct from the translator or compiler. 4. A writer in general.

"Writing" is defined as: 1. A legal instrument; as, the writings of an estate. 2. A composure; a book. 3. A written paper of any kind.

[2] Madison submitted a clause for *literary* authors. Pinckney's version was for authors generally. Pinckney's designation was chosen. See Karl Fenning, "The Origin of the Patent and Copyright Clause of the Constitution", 17 Geo. L. J. 109 (1929).

[3] *Ibid*, pp. 113-114.

tations on other powers of Congress, he refrains from suggesting any limitations on the copyright power and grounds it on the accepted common law.[1]

The copyright clause and its background are consistent with a developing copyright law that continues to adapt itself to the needs of the country as they evolve. The whole history of the copyright power both in the Acts of Congress and in the decisions of the courts shows that to promote science and the arts, the clause is broad enough to protect all original creative works and that whenever new methods of reproduction make possible the pirating of another's artistic works, the Congress may legislate protection, as it has done.

From the first exercise of the constitutional power, the Act of 1790,[2] the protection has not been limited to literal "writings". That Act adopted by a Congress that included many of the members of the Constitutional Convention mentioned maps and charts before books. The Act of 1802.[3] covered designing, engraving, etching or working historical or other prints. These two statutes, adopted in the early period of the Constitution and with the background of contemporary thinking on the constitutional authority, demonstrate forcibly that Art. I, Sec. 8, Cl. 8 was not intended to limit the scope of the copyright power and to single out "authors" of literary productions and deny protection to "authors" of the other creative arts. The

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[1] The Federalist, No. XLIII, Jan. 25, 1788 (Lippincott & Co., 1864 ed.), page 338.

[2] Act of May 31, 1790, c. 15, 1 Stat. 124.

[3] Act of April 29, 1802, c. 36, 2 Stat. 171. This Act was also adopted by a Congress that included members of the Constitutional Convention.

enumeration of maps, charts, historical and other prints cannot be reconciled with any literal application of "writings" as the determining standard.

The subsequent Acts of 1831,[1] 1856,[2] 1865,[3] 1870,[4] 1909,[5] 1912[6] and 1947[7] have done no more than extend the copyright protection to the developing products of intellectual effort which in the changing times have, in the judgment of Congress, warranted the exercise of its constitutional power.

The Act of 1909 which revised and reorganized the copyright laws and is the basic copyright law today expressly provided for copyright of all works of art.[8]

This Court has expressly held that protection of artistic works is within the power of Congress under Art. I, Sec. 8, Cl. 8. In *Burrow-Giles Lithographic Company* v. *Sarony*, 111 U. S. 53, this Court in upholding the power of Con-

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[1] Act of February 3, 1831, c. 16, 4 Stat. 436.

[2] Act of August 18, 1856, c. 169, 11 Stat. 138.

[3] Act of March 3, 1865, c. 123, 13 Stat. 540.

[4] Act of July 8, 1870, c. 230, 16 Stat. 198.

[5] Act of March 4, 1909, c. 230, 35 Stat. 1075.

[6] Act of August 24, 1912, c. 356, 37 Stat. 488.

[7] Act of July 30, 1947, c. 391, 61 Stat. 652. This act codified Title 17 of the United States Code into positive law.

[8] The House Report in connection with the Act of 1909 (H. R. Rep. No. 2222, 60th Cong. 2d Sess. 10, 1909) states with respect to the general provisions of Section 4 providing copyright for all the writings of an author, as follows:

"Section 4 is declaratory of existing law. It was suggested that the word 'works' should be substituted for the word 'writings', in view of the broad construction given by the courts to the word '[illegible]gs', but it was thought better to use the word 'writings', which is the word found in the Constitution. It is not intended by the use of this word to change in any way the construction which the courts have given to it."

gress to extend copyright to photographs broadly interpreted the constitutional power, and stated:

> "These statutes (the Acts of 1790 and 1802) certainly answer the objection that books only, or writing in the limited sense of a book and its author, are within the constitutional provision. Both these words are susceptible of a more enlarged definition than this" (p. 57).
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> * * * * *
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> "We entertain no doubt that the Constitution is broad enough to cover an act authorizing copyright of photographs, so far as they are representative of original intellectual conceptions of the author" (p. 58).
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> * * * * *
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> "These findings, we think, show this photograph to be an original work of art, * * * and of a class of inventions for which the Constitution intended that Congress should secure to him the exclusive right to use, publish and sell, as it has done by section 4952 of the Revised Statutes" (p. 60).

In *Bleistein* v. *Donaldson Lithographing Co.*, 188 U. S. 239, this Court upheld a copyright on circus posters, where the constitutional question was expressly raised below. This Court stated (pp. 249, 250, 251):

> 'We shall do no more than mention the suggestion that painting and engraving unless for a mechanical end are not among the useful arts, the progress of which Congress is empowered by the Constitution to promote. The Constitution does not limit the useful to that which satisfies immediate bodily needs. * * * The copy is the personal reaction of an individual upon nature. Personality always contains something unique. * * * and a very modest grade of art has in it something irreducible, which

is one man's alone. That something he may copyright unless there is a restriction in the words of the act.

"If there is a restriction it is not to be found in the limited pretensions of these particular works. The least pretentious picture has more originality in it than directories and the like which may be copyrighted."

* * * * *

"Certainly works are not the less connected with the fine arts because their pictorial quality attracts the crowd and therefore gives them a real use—if use means to increase trade and to help to make money."

* * * * *

"It would be a dangerous undertaking for persons trained only to the law to constitute themselves final judges of the worth of pictorial illustrations, outside of the narrowest and most obvious limits."

Speaking for this Court in *American Tobacco Co.* v. *Werckmeister*, 207 U. S. 284, Mr. Justice Day after citing Bouvier's definition of copyright embracing "literary or artistic productions" states as follows with respect to Art. I, Sec. 8, Cl. 8 (p. 291):

"Under this grant of authority a series of statutes have been passed, having for their object the protection of the property which the author has in the right to publish his production, the purpose of the statute being to protect his right in such manner that the author may have the benefit of this property for a limited term of years. These statutes should be given a fair and reasonable construction with a view to effecting such purpose."

This Court in the case of photographs and pictorial illustrations and the lower courts in the case of maps, paint-

ings, sculpture and jewelry have upheld the constitutional basis of copyright where the work embodied creative or original artistic or intellectual effort.[1] There can be no sound constitutional objection to the extension by Congress of copyright protection to the three-dimensional subjects—first granted in the Act of 1870 to works of the fine arts and subsequently redefined in the Act of 1909 to include all works of art—where the work meets the test of artistic conception by the author.

(B) The Statutory Basis

Petitioners' arguments that the Copyright Act does not cover artistic jewelry and that the Copyright Office exceeded its authority in its Regulation 37 CFR, 1949, §202.8, have been expressly rejected by both Courts below, and are squarely contrary to the opinion of this Court in *Mazer* v. *Stein, supra.*

Section 202.8 of the Regulation specifically classified artistic jewelry as one of the works of art in Class G.[2]

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[1] Cf. *Derenberg et al.*, "The Meanings of 'Writings' in the Copyright Clause of the Constitution", 31 N. Y. U. L. R. 1263 (Nov. 1956), where it is stated, at page 1286:

"The fact that courts do not consider 'writings' a limitation on form does not mean that any form or subject is entitled to copyright protection. 'Writings' is defined as the expression or form by which the original ideas of the author are given expression. Writings according to the courts are the results, fruits, or conceptions of original or creative intellectual thought or labor, with the primary emphasis on originality and intellection."

[2] Section 202.8 of the Regulation used the following words:

"Works of art (Class G)—(a)—In General. This class includes works of artistic craftsmanship, in so far as their form but not their mechanical or utilitarian aspects are concerned, such as *artistic jewelry*, enamels, glassware, and tapestries, as well as all works belonging to the fine arts, such as paintings, drawings and sculpture * * *." (Emphasis supplied)

This Court in *Mazer* v. *Stein* expressly approved said Regulation and held that the standard of copyrightability therein stated conforms in every respect with the intention of Congress as expressed in the Copyright Act. After quoting §202.8 of the Regulation, this Court stated (347 U. S. at 214):

> "* * * Individual perception of the beautiful is too varied a power to permit a narrow or rigid concept of art. As a standard we can hardly do better than the words of the present Regulation, §202.8, *supra*, naming the things that appertain to the arts. They must be original, that is, the author's tangible expression of his ideas. Compare *Burrow-Giles Lithographic Co.* v. *Sarony*, 111 U. S. 53, 59-60. Such expression, whether meticulously delineating the model or mental image or conveying the meaning by modernistic form or color, is copyrightable."

A literal reading of Section 5(g) of the Act of 1909 and the legislative history, as well as the interpretation thereof reflected in the regulations and practice of the Copyright Office since 1909, readily shows "the lack of substance" to the petitioners' contention, as the Court of Appeals below so characterized it. The fact that the Act does not specifically list artistic jewelry or artistic craftsmanship or any particular work is of no consequence; it includes all "works of art."

Petitioners' argument *ad hominem* that the Register of Copyrights has assumed a legislative function fails to grasp that Section 202.8 of the Regulations merely implements the declared policy of Congress. A reading of Regulation §202.8 shows that it was simply intended to reflect in the classification both ordinary works of art, which Congress introduced in the Act of 1909, and works belong-

ing to the fine arts, which Congress had previously introduced in the Act of 1870.[1]

Petitioners contend that the Act does not protect works of artistic craftsmanship. Since Michelangelo's famous statue of David and Cellini's great saltcellar are undeniably "works of artistic craftsmanship," the petitioners' argument would make the 1909 Act even more limited than the 1870 Act. Petitioners would have this Court believe it did not mean what it said when in *Mazer* v. *Stein* it approved Regulation §202.8 naming artistic craftsmanship as one of the works of art, and that Congress did not mean what it said when it eliminated the word "fine" in the 1909 Act.

By adopting the broad phrase "works of art" in 1909, Congress not only eliminated any distinction which might have theretofore existed between the great works and the works of artistic craftsmanship not achieving the level of greatness; it also, by refusing to specify rigid categories of "art", further expressed a clear intention to protect by copyright original works in a broad variety of artistic, three-dimensional forms.

The copyrighted jewelry pieces designed by Marcel Boucher evidence originality and the use of recognized art

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[1] There is no conceivable relationship between the issues in this case and the provisions of the recently adopted Universal Copyright Convention, 17 U. S. C. §9 (68 Stat. 1030). The anxiety expressed by petitioners (Pet. p. 21) that the Copyright Office might suddenly eliminate certain works from copyright protection in the future is somewhat less than real. In the portion of the trial record quoted by petitioners themselves, Mr. Abraham L. Kaminstein, Chief of the Examining Division of the Copyright Office, testified that "obviously" the Register of Copyrights would not amend the regulations "so as to exclude the registration of copyrightable material" (D. 218a).

techniques characteristically employed in the creation of works belonging to the traditional fine arts. Jewelry design has, historically, attracted the talents of some of the world's greatest artists and sculptors.[1] It tortures plain language of the statute to suggest that Congress has denied copyright to works of the jewelry art which through the centuries has been one of the great recognized arts. As pointed out above, the only difference between costume jewelry and precious jewelry is that the former uses base metals and artificial stones. Indeed, with the popularity that has developed for costume jewelry today the art shown in that form has frequently achieved greater artistic creativeness and imagination than in the designs of precious jewelry.

The lower courts have consistently held that artistic costume jewelry is entitled to copyright under the statute. In *Trifari, Krussman & Fishel, Inc.* v. *Charel Co., Inc.*, S. D. N. Y. 1955, 134 F. Supp. 551, the District Court stated (p. 553):

> "* * * Costume jewelry may express the artistic conception of its 'author' no less than a painting or a statue. * * * There is neither basis in the Copyright Act nor judicial precedent for excluding cos-

[1] In Rogers and Beard, "5000 Years of Gems and Jewelry", Frederick A. Stokes Company (1940), the authors trace the evolution of the jeweler's art, and point out that in the Renaissance goldsmiths, being unable to apply creative imagination to jewelry, were obliged to employ leading artists for that purpose. At page 96 it is stated: "The practice of using patterns designed by draughtsmen, instead of by the goldsmiths themselves, was followed also in France and Germany; and designs for jewelry were made by the leading artists of the day, Albert Durer, the great German artist, among others. * * *" In *Jungersen* v. *Baden*, S. D. N. Y. 1947, 69 F. Supp. 922, 928, the court commented as follows:

"Cellini was undoubtedly a sculptor, but I doubt the jewelers would have regarded him an intruder in their midst. * * * Cellini's first apprenticeship was to a goldsmith. At home he was employed on jewelry. Is his celebrated salt-cellar in the sculptor's or the jeweler's art?"

tume jewelry from works of art to which copyright protection may attach."

To the same effect, see:

Hollywood Jewelry Mfg. Co., Inc. v. *Dushkin*, S. D. N. Y. 1955, 136 F. Supp. 738;

Trifari, Krussman & Fishel, Inc. v. *B. Steinberg-Kaslo Co.*, S. D. N. Y. 1956, 144 F. Supp. 577.

Significantly, petitioners have cited no judicial, legislative or administrative authority denying the right to copyright artistic jewelry. Supporting the copyrightability of artistic jewelry, on the other hand, are a clear and unambiguous mandate from Congress, established Copyright Office practice, a lawfully adopted Regulation of the Copyright Office, a Supreme Court decision upholding that Regulation, and decisions by at least four District Judges upholding the validity of copyrights on jewelry.

Certainly, in this day when serious critics of the American scene have noted a disturbing trend towards mass culture and conformity, every encouragement should be given to creative intellectual effort in all fields of artistic and literary endeavor under the broad constitutional power to promote the progress of "Science and useful Arts."

CONCLUSION

For want of a properly presented substantial federal question, and because the record in no respect presents any question meriting review by this Court, it is respectfully submitted that the petition should be denied.

Respectfully submitted,

THOMAS A. MCGOVERN
BURTON L. KNAPP
Attorneys for Respondents

June 16, 1958.